United Nations A/HRC/30/44

General Assembly

Distr.: General
14 July 2015

Original: English

Human Rights Council
Thirtieth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas*

Summary

This report addresses adverse human rights impacts of international investment agreements, bilateral investment treaties and multilateral free trade agreements on the international order, both from the procedural aspect of their elaboration, negotiation, adoption and implementation, and from the substantive side, focusing on their constitutionality and effects on democratic governance, including the exercise of the State's regulatory functions to advance the enjoyment of civil, cultural, economic, political and social rights. It calls for ex ante and ex post human rights, health and environmental impact assessments, and proposes a plan of action for systemic change.

Because all States are bound by the Charter of the United Nations, all treaties must conform with it, in particular with Articles 1, 2, 55 and 56. While recognizing that globalization may contribute to human rights and development, experience suggests that human rights have frequently been subordinated to dogmas of market fundamentalism with a focus on profit rather than sustainable development. Article 103 of the Charter of the United Nations stipulates that "[i]n the event of conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail". Accordingly, international investment agreements and investor–State dispute settlement agreements must be tested for conformity with the Charter of the United Nations and never undermine the ontological State function to ensure the welfare of all persons under its jurisdiction, nor lead to retrogression in human rights. Conflicting agreements or arbitral awards are incompatible with international *ordre public*, and may be considered contrary to provisions of the Vienna Convention on the Law of Treaties and invalid as *contra bonos mores*.

* The annex to the present report is circulated as received, in the language of submission only.

GE.15-11570(E)

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There is an emerging customary international law of human rights reflecting a consensus that human rights provisions in international agreements, including International Labour Organization (ILO) and World Health Organization (WHO) Conventions, constitute an internationally binding legal regime with *erga omnes* implications. The Independent Expert invites United Nations expert committees, as well as regional human rights courts to reaffirm the precedence of human rights over other treaties. He also invites the General Assembly and United Nations specialized agencies like ILO and WHO to refer pertinent legal questions to the International Court of Justice for advisory opinions. He also invites the Human Rights Council through the universal periodic review and all Special Procedures pursuant to their mandates to review the conformity of these treaties with human rights norms.

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I. Introduction

1. Pursuant to Human Rights Council resolutions 18/6, 21/9, 25/15 and 27/9, the Independent Expert has endeavoured to identify obstacles to the realization of a democratic and equitable international order, including lack of transparency and accountability (A/HRC/21/45 and A/67/277), lack of genuine democratic participation in domestic and global decision-making (A/HRC/24/38), asymmetric economic, financial and trade practices (A/68/284), military expenditures (A/HRC/27/51) and denial of self-determination (A/69/272).

2. In this report, the Independent Expert addresses the adverse impacts of free trade and investment agreements, whether bilateral or multilateral, on the international order. The report to the General Assembly will focus on the impacts of investor–State dispute settlement arbitrations. The Independent Expert has relied on the advice of economists and given attention to the reports of other Special Procedures mandate holders, including the Special Rapporteur on the right to food (A/HRC/19/59/Add.5 and A/HRC/10/5/Add.2); the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health;[1] the Special Rapporteur on the human right to safe drinking water and sanitation;[2] the Special Rapporteur on extreme poverty and human rights;[3] the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights;[4] the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the rights to freedom of peaceful assembly and of association (A/HRC/29/25); the former Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises;[5] and the Working Group on the issue of human rights and transnational corporations and other business enterprises (A/HRC/29/28, paras. 30–31). He strongly endorses articles 1 to 10 of the 2011 Guiding Principles on Business and Human Rights (A/HRC/17/31, annex) and the United Nations "Protect, Respect and Remedy" Framework.[6] He relies on pertinent general comments and concluding observations of treaty bodies including the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child. He welcomes the perceptive diagnoses, recent conferences and pertinent reform initiatives by UNCTAD.[7]

3. Advocates of free trade and investment agreements may question the analysis in this report because of a lack of hands-on experience. Critics, however, cannot delegitimize the

[1] A/69/299, A/HRC/11/12 and A/HRC/20/15/Add.2. See also E/CN.4/2005/51/Add.3 and www.ohchr.org/Documents/Issues/SForum/SForum2015/DainiusPuras.pdf.

[2] "Extraterritorial violations may occur, for example, when … (d) States fail to respect human rights or restrict the ability of others to comply with their human rights obligations in the process of elaborating, applying and interpreting international trade and investment agreements" (A/HRC/27/55, para. 71).

[3] "States should take into account their international human rights obligations when designing and implementing all policies, including international trade, taxation, fiscal, monetary, environmental and investment policies" (A/HRC/21/39, para. 61).

[4] Juan Pablo Bohoslavsky and Juan Bautista Justo, "The conventionality control of investment arbitrations: enhancing coherence through dialogue", *Transnational Dispute Management*, vol. 10, No. 1 (2013), pp. 1–12.

[5] John Ruggie. See www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpIndex.aspx.

[6] business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles.

[7] UNCTAD, World Investment Report 2015, Trade and Development Report 2014.

human rights recommendations contained herein, which correspond to the Human Rights Council's resolutions pertaining to the mandate. An international order of sovereign and equal States under the Charter of the United Nations, committed to the rule of law, transparency and accountability must not be undermined by private attempts to replace it with an international order ruled by transnational enterprises lacking democratic legitimacy.

4. This preliminary report on a complex and multifaceted subject does not question the axiom that, in principle, free trade is a good thing that has promoted development for centuries. A breakdown in trade can even usher economic contraction, as happened with the decline of the Roman Empire into the "dark ages". Although bilateral investment treaties and free trade agreements may foster international exchanges, one should not be so optimistic as to equate trade with welfare or to pretend that "[o]ne could almost say that trade is human rights in practice".[8] Given that tariffs are already low, do they need to be reduced further at the expense of domestic regulation of social policy? The focus has shifted to non-trade barriers, which many countries — both developed and developing — maintain to protect their domestic markets. Some observers contend that bilateral investment treaties and free trade agreements are geopolitical constructs having little to do with trade liberalization, while others like Professor Yash Tandon point to the history of trade as a form of imposing economic dominance.[9] In any case, a sensible compromise that allows foreign direct investment while ensuring the protection of human rights[10] is possible, as recognized by the Guiding Principles on Business and Human Rights. Such obligations are derived from customary law and treaty law, notably the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. By definition, every State's legitimacy depends on its ability to advance the welfare of the population under its jurisdiction. Every State under the rule of law must fulfil this responsibility and cannot divest itself of human rights obligations by outsourcing or privatizing activities that are fundamentally State functions. Before and after entering into international investment agreements, States should conduct human rights, health and environmental impact assessments.[11]

5. Many observers have expressed concern about certain investor–State dispute settlement arbitrations that have effectively overridden the State's fulfilment of its function to regulate domestic labour, health and environmental policies, and have had adverse

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[8] Pascal Lamy (former Director-General of the World Trade Organization (WTO)), "Towards shared responsibility and greater coherence: human rights, trade and macroeconomic policy", speech at the Colloquium on Human Rights in the Global Economy, Geneva, 13 January 2010. Available from www.wto.org/english/news_e/sppl_e/sppl146_e.htm.

[9] Yash Tandon, *Trade is War: the West's War against the World* (OR Books, 2015). See also the history of the Opium Wars to force the opening of China to European trade in Jack Beeching, *The Chinese Opium Wars* (Orlando, Florida, Harcourt Brace Jovanovich, 1975); and Susanna Hoe and Derek Roebuck, *The Taking of Hong Kong: Charles and Clara Elliot in China Waters* (Richmond, Surrey, Curzon Press, 1999).

[10] See Stephan W. Schill (ed.), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010); Joseph François *et al.*, "Reducing transatlantic barriers to trade and investment: an economic assessment", IIDE Discussion Paper No. 20130401(Institute for International and Development Economics, 2013); V. S. Seshadri, "Trans-Atlantic trade and investment partnership", RIS Discussion Paper No. 185 (New Delhi, Research and Information Systems for Developing Countries, 2013); Jeffrey J. Schott and Cathleen Cimino, "Crafting a transatlantic trade and investment partnership: what can be done", Policy Brief No. PB13-8 (Washington, D.C., Peterson Institute for International Economics, 2013); and U.S. Business Coalition for TPP, "VOICES: Asia-Pacific Policy Experts Support TPP", 28 April 2015, available from tppcoalition.org/voices-asia-pacific-policy-experts-support-tpp-at.d-tpa.

[11] See A/HRC/19/59/Add.5; www2.ohchr.org/english/issues/food/docs/report_hria-seminar_2010.pdf and www.humanrights.dk/business/impact-assessment.

human rights impacts, also on third parties, including a "chilling effect" with regard to the exercise of democratic governance. Arbitration tribunals are credible institutions only when they operate in a demonstrably independent, transparent and accountable manner, as required under article 14 (1) of the International Covenant on Civil and Political Rights concerning suits at law. Investor–State dispute settlement tribunals do not operate in a separate legal context, but are bound by the *erga omnes* obligations imposed by the international human rights regime,[12] which permeates all areas of human activity, including by non-State actors. Some observers consider certain arbitration awards frivolous and manifestly ill-founded, yet not appealable.

6. A fundamental problem arises concerning the tension between legally binding human rights treaties and the operation of international investment agreements. As Bohoslavsky has observed: "There is a need for coherence in order to avoid the fragmentation of an international legal order that aspires to legality and, consequently, consistency."[13]

II. Investment protection versus human rights protection

7. "Corporations everywhere may well agree that getting rid of regulations would be good for corporate profits. Trade negotiators might be persuaded that these trade agreements would be good for trade and corporate profits. But there would be some big losers – namely, the rest of us."[14]

8. International investment agreements are not new phenomena in the international arena. Bilateral investment treaties currently number over 3,200. After years of experience with investor–State dispute settlement, the International Centre for Settlement of Investment Disputes (ICSID) and other arbitrations, it has become apparent that the regulatory function of many States and their ability to legislate in the public interest have been compromised. The problem has been aggravated by the chilling effect of certain awards that have penalized States for adopting regulations to protect the environment, food safety, access to generic medicine and reduction of smoking, as required under the WHO Framework Convention on Tobacco Control. The legality of such awards is questionable as contrary to domestic and international *ordre public*, and may be considered, in some cases, *contra bonos mores*.

9. Observers have noted retrogression in the protection of rights including the rights to life,[15] food (A/HRC/25/57), water and sanitation,[16] health, housing, education, culture,

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[12] Bruno Simma and Theodore Kill, "Harmonizing investment protection and human rights: first steps towards a methodology", in Christina Binder *et al.* (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009).

[13] Bohoslavsky (see footnote 4 above), p. 10. See also the report of the Study Group of the International Law Commission on fragmentation of international law: difficulties arising from the diversification and expansion of international law, *Yearbook of the International Law Commission 2006*, vol. II (Part Two), para. 251.

[14] Joseph Siglitz, "On the wrong side of globalization", *New York Times*, 15 March 2014. See also Pope Francis' statement http://www.pagina12.com.ar/diario/elpais/1-276806-2015-07-10.html

[15] The right to life is impacted when a person dies because of lack of access to medicine because pharmaceutical monopolies have "privatized knowledge" and, through "evergreening" of patents, delay or make the introduction of significantly cheaper generic medicine impossible. The right to life is also violated when farmers and other labourers have their livelihoods destroyed by "free trade" without protective governmental action. For instance, bilateral investment treaties and free trade agreements impacted millions of farmers in India and caused a significant rise in suicides, see

improved labour standards, an independent judiciary, a clean environment and the right not to be subjected to forced resettlement. Moreover, there is a legitimate concern that international investment agreements might aggravate the problem of extreme poverty,[17] foreign debt renegotiation, financial regulation and the rights of indigenous peoples, minorities, persons with disabilities and older persons and other vulnerable groups.

10. The Working Group on business and human rights has stressed in its reports that the Guiding Principles on Business and Human Rights stipulate in principles 8 and 9 that "States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations" and that "States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts". Accordingly, all international investment agreements under negotiation should include a clear provision stipulating that in case of conflict between the human rights obligations of a State and those under other treaties, human rights conventions prevail.

11. The 1994 North American Free Trade Agreement (NAFTA) is an example of an agreement that has led to relocation of manufacturing industries, resulting in loss of employment in the United States (estimated at 850,000 jobs) and the proliferation of assembly centres in Mexico, known as *maquiladoras*,[18] where labour costs are lower and social protection below ILO standards. NAFTA "provided investors with a unique set of guarantees designed to stimulate foreign direct investment and the movement of factories within the hemisphere … . Furthermore, no protections were contained in the core of the agreement to maintain labor or environmental standards. As a result, NAFTA tilted the economic playing field in favor of investors, and against workers and the environment".[19] Several international investment agreements are currently being negotiated, mostly in secret, including the Transatlantic Trade and Investment Partnership (TTIP), the Trade in Services Agreement, the Trans-Pacific Partnership and the Regional Comprehensive Economic Partnership.[20]

12. Numerous scholars and Nobel prize laureates in economics have already signalled the dangers to democratic governance and human rights. Stiglitz states: "These agreements

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Devinder Sharma, "'Free' trade killing farmers in India", November 2007, available from www.bilaterals.org/?free-trade-killing-farmers-in.

[16] www.cepal.org/es/publicaciones/3839-proteccion-del-derecho-humano-al-agua-y-arbitrajes-de-inversionhttp://cap-net-esp.org/document/document/181/agua_y_saneamiento_tratados_de_protecci%C3%B3n_a_las_inversiones.pdf.

[17] www.globalresearch.ca/the-free-trade-agreements-the-asia-europe-peoples-forum-call-to-action/5416888?print=1.

[18] See www.hrw.org/news/1996/08/17/mexicos-maquiladoras-abuses-against-women-workers; sdmaquila.blogspot.ch/2010/02/maquiladoras-101-english.html; and www.researchgate.net/publication/266820089_Human_rights_violations_in_the_Maquiladora_Industry.

[19] Robert E. Scott, "The high price of 'free' trade: NAFTA's failure has cost the United States jobs across the nation", Briefing paper No. 147, Economic Policy Institute, 17 November 2003, available from www.epi.org/publication/briefingpapers_bp147.

[20] See www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/RCEP/; donttradeourlivesaway.wordpress.com/2015/06/11/press-statement-civil-society-raises-major-concerns-on-indias-engagement-with-the-massive-rcep-trade-deal/; and trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf. The European Free Trade Association is also negotiating free trade agreements: see www.asean.org/images/2012/documents/Guiding%20Principles%20and%20Objectives%20for%20Negotiating%20the%20Regional%20Comprehensive%20Economic%20Partnership.pdf.

go well beyond trade, governing investment and intellectual property as well, imposing fundamental changes to countries' legal, judicial, and regulatory frameworks, without input or accountability through democratic institutions. Perhaps the most invidious — and most dishonest — part of such agreements concerns investor protection. Of course, investors have to be protected against the risk that rogue governments will seize their property. But that is not what these provisions are about. There have been very few expropriations in recent decades, and investors who want to protect themselves can buy insurance from the Multilateral Investment Guarantee Agency, a World Bank affiliate (the US and other governments provide similar insurance). … The real intent of these provisions is to impede health, environmental, safety, and, yes, even financial regulations."[21] With regard to developing countries, the 2014 report of the United Nations Conference on Trade and Development (UNCTAD) further notes: "Foreign capital flows to developing and transition economies may support investment, economic diversification and growth, or generate macroeconomic instability, external imbalances and boom-and-bust-credit episodes. … For macroprudential and developmental reasons, governments need sufficient policy space to be able to manage foreign capital flows, influence their amount and composition, and channel them to productive uses."[22] This correctly points out that foreign direct investment and other capital flows can generate problems in areas beyond human rights.

13. Observers have noted grave democratic deficits with international investment agreements and investor-State dispute settlement tribunals and wondered why States continue to engage in negotiations, based on partisan studies and overly optimistic forecasts about gross domestic product (GDP) growth and employment. Not only is there a failure of States to proactively disclose information about the agreements, but key stakeholders are excluded from the negotiating table, where mostly corporate lawyers and lobbyists[23] participate. There is even an attempt to circumvent parliaments by "fast-tracking" the adoption of these agreements, manifesting a gross absence of due process and hence of democratic legitimacy.

14. There is no lack of good diagnoses about the challenge. The problem lies in part in an anachronistic and uncritical commitment to the philosophy of market fundamentalism. Joseph writes perceptively: "Free trade is not an end in itself. … The fervour with which free trade advocates continue to promote their cause is astonishing."[24] Stiglitz notes the lack of empirical evidence that trade liberalization has significantly increased GDP and employment, notwithstanding dogmatic assertions to that effect and amazingly optimistic forecasts for agreements currently under consideration.[25] As Joseph observes, because trade law spills over into other areas of law, the desire for certainty cannot legitimately quarantine trade rules from allegedly non-trade considerations such as human rights and

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[21] www.project-syndicate.org/commentary/us-secret-corporate-takeover-by-joseph-e--stiglitz-2015-05.

[22] *Trade and Development Report, 2014*, p. 145. Available from http://unctad.org/en/PublicationsLibrary/tdr2014_en.pdf. See also *UNCTAD World Investment Report 2015: Reforming the International Investment Regime*.

[23] See www.washingtonpost.com/wp-srv/special/business/trade-advisory-committees/index.html; big.assets.huffingtonpost.com/WarrenBrownTPPLetter.pdf; corporateeurope.org/pressreleases/2014/07/agribusiness-biggest-lobbyist-eu-us-trade-deal-new-research-reveals; www.publicintegrity.org/2005/07/07/5786/drug-lobby-second-none; www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf; and www.opensecrets.org/lobby/methodology.php.

[24] Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford University Press, 2011), p. 288.

[25] Joseph Stiglitz and Andrew Charlton, *Fair Trade for All: How Trade can Promote Development* (Oxford University Press, 2005), p. 34.

labour standards.[26] With regard to ongoing negotiations on the TTIP, Capaldo questions current assumptions and the projections: "Projections by different institutions have been shown to rely on the same Computable General Equilibrium Model that has proven inadequate as a tool for trade policy analysis. … [W]e assess the effects of TTIP using the United Nations Global Policy Model, which incorporates more sensible assumptions on macroeconomic adjustment, employment dynamics, and global trade. We project that TTIP will lead to a contraction of GDP, personal incomes and employment. We also project an increase in financial instability and a continuing downward trend in the labor share of GDP."[27]

III. Investor–State dispute settlement: a challenge to democracy and the rule of law[28]

15. Among the major threats to a democratic and equitable international order is the operation of arbitral tribunals that act as if they were above the international human rights regime. Investor–State dispute settlement tribunals are made up of corporate arbitrators whose independence has been repeatedly questioned because of conflicts of interest.[29] Admittedly, corporate arbitrators are not natural guardians of the public interest, but of business interests and of a new "industry" that, as experience shows, has privileged investors over the public. The investor–State dispute settlement system entails a completely separate system of dispute settlement, not only outside the domestic court system, but above it, and without appeal. The mind reverts to Juvenal's question *quis custodiet ipsos custodes?* ("who guards the guardians?"). Can a democracy call itself democratic if it allows the creation of separate, non-transparent and non-accountable systems of dispute settlement?

16. Observers question the legitimacy of tribunals where the investor can sue the State but not vice versa.[30] Interpretations of terms such as "investment", "expropriation" and "fair

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[26] Joseph (see footnote 23 above), citing Frank Garcia, "The global market and human rights: trading away the human rights principle", *Brooklyn Journal of International Law*, vol. 7 (1999), p. 51, at p. 65. See also Jeronim Capaldo, "The Trans-Atlantic Trade and Investment Partnership: European disintegration, unemployment and instability", GDAE Working Paper No. 14-03, Global Development and Environment Institute at Tufts University, available from http://ase.tufts.edu/gdae/policy_research/ttip_simulations.html.

[27] Capaldo (see footnote above).

[28] For investor–State dispute settlement cases in the database of publicly available investment cases under investment chapters of free trade agreements and bilateral investment treaties, searchable by type of policy challenged by investor (for example, environment), but not updated after May 2010, see www.iiapp.org/. For texts of awards in investor–State dispute settlement cases, see www.italaw.com and unctad.org/en/Pages/DIAE/investor–State dispute settlement.aspx. See also www.baerbel-hoehn.de/fileadmin/media/MdB/baerbelhoehn_de/www_baerbelhoehn_de/investor–State dispute settlement_TAFTA_Bundestag.pdf, and www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf.

[29] See Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom* (Corporate Europe Observatory, Brussels, 2012), available from www.tni.org/sites/www.tni.org/files/download/profitingfrominjustice.pdf, acta.ffii.org/?p=2118, corporateeurope.org/sites/default/files/annex-2-still-not-loving-isds.pdf, corporateeurope.org/international-trade/2014/07/commission-isds-reform-plan-echo-chamber-business-views, www.bilaterals.org/?investor-to-state-dispute, and www.italaw.com/sites/default/files/case-documents/ita0221.pdf.

[30] See John Hendy, "A threat to the sovereignty of courts and parliaments", *Graya*, No. 128 (2015), pp. 52–56.

and equal treatment" have been expansive and difficult to reconcile with the interpretation rules under articles 31 and 32 of the Vienna Convention on the Law of Treaties. Experience shows that arbitrators interpret international investment agreements without human rights or environmental constraints. Their procedures are not transparent and it is not even known how many arbitrations have actually taken place, because most of them are not published. What becomes apparent is the strong business bias of the arbitrators and their feeling of being immune to general principles of law. In a 2012 report, UNCTAD noted that an "expansive interpretation of minimalist treaty language can give rise to a lack of predictability in the application of the standard. This, in turn, may lead to the undermining of legitimate State intervention for economic, social, environmental and other development ends".[31]

17. Spanish arbitrator Fernández-Armesto notes: "When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all … Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament."[32] Indeed, it is disturbing that arbitrators can disregard basic principles such as respect for the "margin of discretion" of States, State legislation and even the judicial pronouncements of the highest domestic courts. The one-way street of investor protection has not contributed to a culture of investor–State cooperation but fuelled an aggressive tendency to litigate and demonstrably generated a "regulatory chill". Arbitration may take place in Washington under the auspices of the World Bank's ICSID, but there is a worrisome degree of forum-shopping, and tribunals may meet before the London Court of International Arbitration, the International Chamber of Commerce, the Stockholm Chamber of Commerce, the Hong Kong International Arbitration Centre or the United Nations Commission on International Trade Law (UNCITRAL). There is a growing number of arbitrations that privilege profit over human rights.[33] According to UNCTAD, many investor–State dispute settlement arbitrations are completely confidential and information is available only regarding some 608 awards.[34] The Independent Expert refers to his forthcoming report to the General Assembly and flags a few cases in order to illustrate litigation practices and their human rights implications.

18. In 2013, Lone Pine, a Calgary-based company registered in the United States sued Canada not under Canadian law, but under chapter 11 of NAFTA, challenging the moratorium by Quebec on fracking. The company did not give Canada time to weigh scientific studies showing that some fracking chemicals include carcinogens and hazardous air pollutants justifying preventive measures.[35] Lone Pine contends that the moratorium is "arbitrary" and "capricious," and that it expropriates Lone Pine's profit.

19. Ethyl Corporation, a Virginia corporation with a Canadian subsidiary, submitted a claim alleging that a Canadian statute banning imports of the gasoline additive MMT

[31] *Fair and Equitable Treatment* (United Nations publication, Sales No. E.11.II.D.15), p. 2.

[32] www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy.

[33] European Center for Constitutional and Human Rights, "Human rights inapplicable in international investment arbitration?", available from www.ecchr.de/worldbank/articles/human-rights-inapplicable-in-international-investment-arbitration.html.

[34] UNCTAD, *IIA Issues Note*, No. 1 (February 2015), available from unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.

[35] commonsensecanadian.ca/quebec-fracking-nafta-challenge-right-water-right-profit/.

breached the obligations of Canada. Rather than fight, Canada withdrew the ban, notwithstanding health dangers.[36]

20. *Metalclad v. Mexico* involved a corporation suing Mexico for refusing to allow it to build a waste disposal which would pollute the Mexican water supply. The arbitrators granted Metalclad $16.79 million in compensation for lost profits.[37]

21. In 2013, the French transnational Veolia sued Egypt because of alleged loss of expected profits as a result of Egypt raising the minimum wage. The amount in controversy is $82 million.[38]

22. *Aguas del Turani S.A. v. Republic of Bolivia* concerned a contract privatizing the water supply of Cochabamba, including 40-year concessions with a guaranteed annual cash flow. The deal was endorsed by the World Bank, which imposed privatization as a condition for credit. The majority shareholders of Aguas were the American company Bechtel and the Spanish multinational Abengoa. After the contract was implemented in 1999, water prices increased sharply. When people demonstrated for their right to an affordable water supply, the then-Government declared martial law and tried to quell protests by military force. After the death of a 17-year-old adolescent, the Plurinational State of Bolivia cancelled the privatization contract and Aguas sued for $50 million.[39]

23. In 2009, the Swedish energy conglomerate Vattenfall sued Germany under the Energy Charter Treaty, demanding 1.4 billion euros in compensation for environmental measures restricting the use and discharge of cooling water into the River Elbe. Only after Germany agreed to lower its environmental standards was settlement reached, with adverse effects on the river and wildlife.[40] Following the Fukushima disaster, the German public demanded the closure of nuclear plants and the Government of Germany decided on a phase-out of nuclear energy. Vattenfall is currently seeking 4 billion in compensation.[41]

24. One of the most egregious ICSID arbitrations concerned the case by United States-based Occidental Petroleum against Ecuador concerning the termination of an oil production site in the Amazon, and resulting in an award of $1.76 billion to Occidental ($2.4 billion with interest), which Ecuador accused of multiple human rights violations and environmental destruction.[42]

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[36] www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng and www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf.

[37] www.citizen.org/documents/NAFTAReport_Final.pdf and solidarity-us.org/node/977. See also www.baerbel-hoehn.de/fileadmin/media/MdB/baerbelhoehn_de/www_baerbelhoehn_de/ISDS_TAFTA_Bundestag.pdf and www.oecd.org/daf/inv/internationalinvestmentagreements/40077817.pdf.

[38] www.elstel.org/ISDS.html.en; infojustice.org/archives/34113.

[39] www.citizen.org/cmep/article_redirect.cfm?ID=9208; documents.foodandwaterwatch.org/doc/ICSID_web.pdf and www.elstel.org/ISDS.html.en.

[40] www.italaw.com/cases/documents/1655. Nathalie Bernasconi, "Background paper on *Vattenfall v. Germany*", IISD; Rechtsanwälte Günther (2012) Briefing Note. The Coal-fired Power Plant Hamburg-Moorburg.

[41] www.fr-online.de/energie/atomausstieg-vattenfall-fordert-milliarden,1473634,21169258.html Power Shift (2012) Der deutsche Atomausstieg auf dem Prüfstand eines internationalen Investionsschiedsgerichts? Hintergründe zum neuen Streitfall Vattenfall gegen Deutschland. www.iisd.org/pdf/2012/powershift_forum_briefing_vattenfall.pdf.

[42] One of the worst aspects of this case is that Ecuador was justified in terminating Occidental's permit under Ecuadorian law and the contract and still the investor–State dispute settlement tribunal penalised Ecuador. www.citizen.org/documents/oxy-v-ecuador-memo.pdf.

25. In *Philip Morris (Switzerland) v. Uruguay* (2010), the multinational sued under the Switzerland–Uruguay bilateral investment treaty claiming that the Uruguayan anti-smoking legislation devalued its investments, blithely disregarding the WHO Framework Convention on Tobacco Control.[43] WHO submitted an *amicus curiae* brief.

26. In 2009, an Ecuadorian court fined Chevron for environmental damage caused by its activities. Chevron refused to pay and turned to UNCITRAL to demand damages from Ecuador for lost profits.[44] Litigation is pending.

27. When Philip Morris filed a claim against Australia[45] in 2011 challenging the Australian measures to reduce tobacco consumption, the Government stated that it rejected investor–State dispute settlement "provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. … The Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme. … If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries."[46]

28. Only gradually are governments and parliamentarians beginning to counter the corporate move against the fundamentals of State sovereignty. In the European Parliament, the issue of corporate blackmail has been raised in connection with the debate on the TTIP, arguing on the basis of *Vattenfall* and *Veolia* that multinational companies are using investor protection rules to achieve corporate aims, increasing the cost to the taxpayer of defending public policy and rules. A concept paper of the European Commission, "Investment in TTIP and beyond – the path for reform",[47] outlines possible improvements in free trade agreement models so as to guarantee the State's policy space. Experience has shown that self-regulation has proven insufficient,[48] notwithstanding the Guiding Principles on Business and Human Rights, which should be made legally binding by treaty. In this context, it must be stressed that the possibility that arbitrations may find for the State and against the investor does not remove the danger nor legitimize the investor–State dispute settlement model, since the mere threat of such arbitration has dissuaded even developed States like Canada from adopting social legislation. Developing countries are even more vulnerable to the threat,[49] since they lack the resources to defend themselves against major transnational enterprises.

29. The manifest abuse of rights by investors is so brazen that one could imagine that one day the military-industrial complex might invoke investor–State dispute settlement when a country decides to reduce or terminate the production of anti-personnel landmines

[43] www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/.

[44] www.italaw.com/cases/257. See also truth-out.org/news/item/23788, fpif.org/nafta-20-model-corporate-rule/, and content.time.com/time/world/article/0,8599,2053075,00.html.

[45] www.italaw.com/cases/851 and /www.iisd.org/itn/2011/07/12/philip-morris-v-uruguay-will-investor-state-arbitration-send-restrictions-on-tobacco-marketing-up-in-smoke/.

[46] www.acci.asn.au/getattachment/b9d3cfac-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx. The current Government of Australia may consider investor–State dispute settlement on a treaty-by-treaty basis.

[47] trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF. See also the *UNCTAD World Investment Report 2015: Reforming International Investment Governance*, which presents an action menu for investment regime reform. UNCTAD, *IIA Issues Note*, May 2015.

[48] cest.columbia.edu/files/2012/11/FDI-Perspectives-eBook-v2-Nov-2012.pdf.

[49] Guatemala, www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corportations-sue-states-ttip-icsid.

or cluster bombs because contrary to international humanitarian law, thus "expropriating" expected profits of the arms industry.

39. It is not just a question of reforming the investor–State dispute settlement system for the future, but imperative to review and revise existing bilateral investment treaties and free trade agreements, which were never intended to become prisons for States. If investor–State dispute settlement and ICSID have since mutated into institutions of economic coercion, they must be dismantled and reinvented through the Vienna Convention on the Law of Treaties.

IV. Normative framework

31. Although bilateral investment treaties and free trade agreements have been on the international agenda for decades, their human rights impacts have been underreported. Apparently the siren call of potential profit and the over-optimistic forecasts promising GDP growth and significant creation of jobs have been so seductive to some governments that human rights considerations have been neglected and State functions compromised.

32. Among the sources of law recognized by the International Court of Justice are the general principles of law (art. 38 (1)(c) of the Statute of the International Court of Justice) which inform both national and international legal orders. Among those fundamental principles is good faith (bona fide), which has been incorporated into the civil codes and Constitutions of many States, and means that the law must be coherent and cannot be used antithetically to destroy rights. The Universal Declaration of Human Rights enshrines this principle in article 30, which is reflected in article 5 of the two Covenants. Other relevant general principles of law include the principles of proportionality, foreseeability, *rebus sic stantibus*, clean hands, estoppel (*ex injuria non oritur jus*), the prohibition of abuse of rights, entrapment and the prohibition of treaties or contracts that are *contra bonos mores*.

33. Most States have enshrined in their Constitution and legislation the concept of *ordre public*. A government that compromises its competence to defend and protect the interests of the persons living under its jurisdiction betrays its raison d'être and loses its democratic legitimacy.

34. The large body of existing human rights treaties, protocols and declarations create a constitutional framework that must be taken into account whenever a State enters into agreements with other States and/or private-sector actors, including financial institutions and transnational enterprises. The human rights regime, including international and regional human rights treaties and the relevant ILO and WHO Conventions, must be treated as superior to other agreements, including bilateral investment treaties and free trade agreements. National courts and international tribunals and arbitration instances must be subordinated to this regime.

35. Among the rights that States must ensure are the rights to life, security of person, participation in the conduct of public affairs, homeland, movement, health, education, employment and social security. These commitments are enshrined, inter alia, in articles 1, 2, 6, 9, 12, 17, 25, 26, 27 of the International Covenant on Civil and Political Rights and articles 1, 2, 5, 6, 7, 9, 10, 11, 12 and 13 of the International Covenant on Economic, Social and Cultural Rights.

36. The process of elaboration, negotiation and adoption of bilateral investment treaties and free trade agreements must conform with the requirement of article 25 (a) of the International Covenant on Civil and Political Rights to ensure participation by all stakeholders. This entails a proactive obligation on the part of Governments to disclose the necessary information and facilitate public participation. Access to information is an

essential condition for the exercise of the right of freedom of opinion and expression under article 19 of the International Covenant on Civil and Political Rights. The added value of consultation and participation is building consensus which decreases the likelihood of onerous litigations. Parliaments have a high responsibility to carefully examine bilateral investment treaties and free trade agreements and ensure that human rights and environmental impact assessments are carried out.

37. Trade negotiations conducted in secret (although not a matter of national security!) and excluding key stakeholders entail prima facie violations of articles 19 and 25 of the International Covenant on Civil and Political Rights.[50] As the Independent Expert explained in his 2013 report to the Council, democratically elected representatives do not have carte blanche from the electorate, but must consult with constituents and act according to their wishes.[51] Democracy is not exercised only once in a while, but entails a continuing dialogue between representatives and constituents. Had it not been for Wikileaks[52] publishing several chapters of the free trade agreements under discussion, the necessary public debate could not even have gotten started.

38. The Committee on Economic, Social and Cultural Rights has issued pertinent general comments: No. 12 on the right to adequate food (art. 11), paragraphs 19 and 36 ("States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention"), No. 14 on the right to the highest attainable standard of health (art. 12), paragraph 39 ("In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health") and paragraph 41 prohibiting embargos or sanctions on medicines and medical equipment; No. 15, on the right to water (arts. 11 and 12), paragraphs 31 and 35–36 ("States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water"); No. 18 on the right to work (art. 6) and No. 19 on the right to social security (art. 9).[53]

39. These commitments are further strengthened by ILO Conventions 14, 29, 77, 78, 87, 95, 98, 102, 105, 138, 169 and 182. Also of relevance are WHO Conventions and other international treaties including the Convention for the Safeguarding of the Intangible Cultural Heritage, the Convention concerning the Protection of the World Cultural and Natural Heritage, and the United Nations Framework Convention on Climate Change.

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[50] Article 1 of Wilson's 14 Points already warned against secret treaties. Article 102 of the Charter of the United Nations requires treaties to be published. Even if bilateral investment treaties and free trade agreements have been partly published, they possess no democratic legitimacy unless the public can participate in negotiation and adoption. Some observers have articulated the fear that one reason for the worldwide surveillance of private citizens may be to predict when and where democratic movements are likely to arise so as to nip them in the bud. Hence the protection of the right to privacy and the prohibition of surveillance without warrant are mandated by articles 14 and 17 of the International Convenant on Civil and Political Rights.

[51] A/HRC/24/38, paras. 15–24. See also Vienna Declaration and Programme of Action, para. 8.

[52] Personal interview with Julian Assange at the Mission of Ecuador in London on 20 March 2015. wikileaks.org/tpp/pressrelease.html, wikileaks.org/tpp-investment/press.html, wikileaks.org/tisa/press.html and www.theguardian.com/media/2015/jun/03/wikileaks-documents-trade-in-services-agreement.

[53] tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11.

40. Universal and regional human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and Peoples' Rights necessarily take precedence over other treaties. As the European Court of Human Rights decided in its 1989 judgment in *Case of Soering v. the United Kingdom*, the obligations under the European Convention on Human Rights prevail over those under extradition treaties, *mutatis mutandis* over bilateral investment treaties and free trade agreements.

V. Systemic reform

41. Extraordinary problems require bold solutions. Anti-democratic investor–State dispute settlement paroxysms can be neutralized by revision or termination of such dispute settlement. If States can adopt extraordinary measures such as bailing out delinquent banks, *a fortiori* they can adopt measures to protect the welfare of the population. Protective actions by a State whose economy, agriculture or industry is in danger of failure because of the sometimes unpredictable effects of bilateral investment treaties and free trade agreements may be justifiable under the force majeure principle.

42. The validity of bilateral investment treaties and free trade agreements should be tested under the rules of the Vienna Convention on the Law of Treaties. For instance, a treaty may be void if it can be established that there was a manifest violation of the State's Constitution, errors relating to a fact or situation which was assumed to exist at the time the treaty was concluded and which formed an essential basis of its consent to be bound to the treaty (art. 48), fraudulent conduct by a negotiating party (art. 49), deliberately misleading or spurious claims, corruption (art. 50), coercion (arts. 51–52) or conflict with a peremptory norm of international law (art. 53). Treaties may also be terminated or their application suspended pursuant to the doctrine of material breach (art. 60), subsequent impossibility of performance (art. 61) or fundamental change of circumstances (art. 62). Normally, treaties contain provisions for denunciation or withdrawal. In the absence of such provisions, such a right may be implied by the nature of the treaty (art. 56). To the extent that bilateral investment treaties and free trade agreements lead to violations of human rights, they should be modified or terminated. Articles 65 *et seq.* lay down the procedure.

43. In a famous article in the *American Journal of International Law*, Verdross elucidated which treaties can be considered *contra bonos mores*: "To this problem the decisions of the courts of civilized nations give an unequivocal answer. The analysis of these decisions shows that everywhere such treaties are regarded as being *contra bonos mores* which *restrict the liberty of one contracting party in an excessive or unworthy manner or which endanger its most important rights*. This and similar formulas prove that the law of civilized states starts with the idea which demands the establishment of a juridical order guaranteeing the rational and moral coexistence of the members. It follows that all those norms of treaties which are incompatible with this goal of all positive law — a goal which is implicitly presupposed — must be regarded as void."[54] Moreover, pursuant to

[54] Alfred Verdross, "Forbidden Treaties in International Law", *American Journal of International Law*, Vol. 31, No. 4 (1937), pp. 571 *et seq.* Verdross, "Les principes du droit et la jurisprudence internationale", *Recueil des Cours de l'Académie de Droit International*, La Haye, (1935), pp. 195–249. Robert Kolb, *The International Court of Justice*, Oxford, 2013, p. 81. Irmgard Marboe and August Reinisch, "Contracts between States and foreign private law persons" in *Max Planck Encyclopedia of Public International Law*, vol. II, pp. 758–766. Oxford, 2012. felj.org/sites/default/files/elj/Energy%20Journals/Vol17_No1_1996_article_international.pdf.

the doctrine of severability, treaty provisions that are *contra bonos mores* can be severed without abandoning the entire treaty.

44. Any court ruling on the legality of a particular treaty or contract would have to look at its constitutionality. Hence the question whether, under any reasonable interpretation of a country's Constitution, a State can waive its ontological function to legislate in the public interest. In most jurisdictions, the courts would answer in the negative. Moreover, there is an ethical minimum threshold that underlies every contract or treaty. A treaty is *contra bonos mores* if it prevents the universally recognized tasks of the civilized State: (a) maintenance of public order; (b) defence of the State against external attacks; (c) care of the bodily and spiritual welfare of persons under its jurisdiction at home; and (d) protections of citizens abroad.[55]

45. Many States have in their Constitutions and legislation provisions concerning good faith and the illegality of unjust enrichment. Moreover, it is not only the written law that stands, but the broader principles of natural justice as already recognized in Sophocles' *Antigone*, affirming the unwritten laws of humanity (*αγραφος νομος*), and the concept of a higher moral law prohibiting unconscionably taking advantage of a weaker party, which could well be considered a form of economic neo-colonialism or neo-imperialism. Many Constitutions contain provisions concerning abuse of rights, which may find application when a transnational enterprise interferes in a government protecting employment, health, the environment and social order.

46. Investors might be tempted to invoke the principle *pacta sunt servanda* ("agreements must be kept", art. 26 of the Vienna Convention on the Law of Treaties), a kind of positivism akin to the "pound of flesh" mentality described in Shakespeare's *Merchant of Venice*, where the money-lender Shylock adamantly insists on specific performance of a contract stipulating the taking of a pound of flesh from the body of the borrower, the bankrupt merchant Antonio. Undoubtedly Shylock had a right to reimbursement, but demanding a pound of flesh from Antonio's breast would have meant an attempt on his life. Shakespeare decides the competing rights in Antonio's favour. By analogy, it can be said that a petroleum company that is polluting the waters and causing major environmental damage cannot claim that its profits are guaranteed and that a State ordinance to prevent environmental damage should be repealed. Such legalistic nonsense borders on the criminal, and is invalidated by Article 103 of the Charter of the United Nations.

47. International criminal law and the Nuremberg precedents[56] might also be relevant in examining bilateral investment treaties and free trade agreements, to the extent that transnational corporations and their lobbyists may have engaged in activities that contravene penal law. It would be appropriate to test whether the concept of "conspiracy" to commit acts that are *contra bonos mores* (or "joint criminal enterprise" as used by the International Criminal Tribunal for the Former Yugoslavia) can be applied to the method in which international investment agreements have been elaborated and negotiated in secrecy. Are States or some transnational corporations guilty of "conspiracy"? Actions in pursuance of such conspiracy could include deliberately giving false information; issuing false

[55] law.wustl.edu/SBA/upperlevel/International%20Law/Intl.aw-Mutharika2.pdf.

[56] Nazi entrepreneurs were held criminally responsible for the consequences of some of their business activities. www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-related-to-robert-h-jackson/the-influence-of-the-nuremberg-trial-on-international-criminal-law/. Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, New York,1992. The principle applies also in the context of more recent human rights violations. Horacio Verbitsky, Juan Pablo Bohoslavsky (eds.), *Cuentas Pendientes. Los cómplices de la dictadura*, Siglo veintiuno, 2013.

forecasts of GDP and employment growth; engaging think tanks, economists, universities or foundations in preparing "teleological reports"; and colluding with media conglomerates to ensure that only the "sunny" side of bilateral investment treaties and free trade agreements is presented and contentious issues are suppressed or minimized. The issue of corporate criminal responsibility for ecocide[57] and other offences deserves in-depth analysis in a future report.[58]

48. In reviewing the validity of the treaties, courts should also consider equitable arguments, both *intra legem* equity (within the rules of international law) and *praeter legem* equity (in the place of the rules of international law, applying the rules of justice or "substance over form"). Indeed, there is an inherent power for every court including the International Court of Justice to make decisions *ex aequo et bono* (based on what is fair and right), as in all agreements there is inherent equity. Each party who enters into an agreement tries to obtain the best possible deal, and when countries entered into bilateral investment treaties and free trade agreements they were expecting GDP growth, job creation and development. None imagined that the agreements would include "Trojan Horse" provisions such as unpredictable investor–State dispute settlement commitments and "survival clauses", nor dreamt that arbitrators would interpret concepts like "expropriation" as encompassing fiscal, budgetary, macroprudential, social, environmental or health measures that could potentially reduce investors' profits. Had this danger been clearly explained, probably no State would have consented. Thus, to the extent that there was inadequate disclosure of the risks, false representations and overly optimistic growth forecasts, there was no informed consent and the Vienna Convention on the Law of Treaties provides grounds for modification or termination.

49. Substantively, investor–State dispute settlement tribunals cannot immunize investors from responsibility to make amends for damage caused, and the "polluter pays" principle cannot be trumped by a claim that paying fines is tantamount to an "expropriation". Such a claim would be rejected by any independent tribunal as blatantly frivolous and contrary to *ordre public*.

50. Pursuant to this analysis, the denunciation of international investment agreements is not only legitimate but also legal and their "survival clauses" must be seen as null and void when they are intended to perpetuate a system that violates human rights.

VI. Outlook

51. "There is no fast or ready-paved road to sustainable and inclusive development; but the past three decades have demonstrated that delivery is unlikely with a one-size-fits-all approach to economic policy that cedes more and more space to the profitable ambitions of global firms and market forces. Countries should ultimately rely on their own efforts to mobilize productive resources and, especially, to raise their levels of domestic investment (both public and private), human capital and technological know-how. However, for this they need to have the widest possible room for manoeuvre to discover which policies work in their particular conditions, and not be subject to a constant shrinking of their policy space".[59]

[57] Polly Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of our Planet*, London, 2010.

[58] Harmen van der Wilt, "Corporate criminal responsibility for international crimes", *Chinese Journal of International* law, vol. 12 (Issue 1), pp. 43–77.

[59] *UNCTAD Trade and Development Report, 2014*.

52. Pursuant to article 28 of the Universal Declaration of Human Rights, States shall ensure "a social and international order in which the rights and freedoms set forth in this declaration can be fully realized". This is reinforced in article 2 of the International Covenant on Civil and Political Rights and article 2 of the International Covenant on Economic, Social and Cultural Rights.

53. The adoption of 10 core international human rights treaties and countless resolutions and declarations of the General Assembly, the Economic and Social Council and the Human Rights Council, pertinent ILO and WHO Conventions, the emergence of a system of regional human rights courts capable of adopting binding judgments, the 1993 Vienna Declaration and Programme of Action, the Millennium Development Goals – all these instruments over a period of many decades prove that a customary international law of human rights has emerged, manifesting *opinio juris* and international consensus on the primacy of human rights. Accordingly, globalization and targeted investment ought to foster an environment where human rights are fully realized through the State's regulatory functions. Alas, international investment agreements are usurping State functions as if the only rights were the rights to trade and to invest.

54. In the field of intellectual property, there is consensus that it deserves protection which must occur, however, in tandem with human rights considerations. Twenty-first century humanity functions on the basis of thousands of years of freedom of knowledge, or the free interchange of ideas and inventions. While there is justice in rewarding research and patenting new pharmaceuticals and inventions, monopolies must not contribute to greater inequality and Governments should regulate to ensure flexibility and prevent "evergreening" practices. Access to affordable medicine is essential to protect the right to life, and refusal to provide such affordable medicine is tantamount to the criminal offence of denial of humanitarian aid[50] or assistance to persons in danger. In other words, knowledge cannot be appropriated for profit, privatized or commoditized, but rather shared in international solidarity. Sharing knowledge without fee, as the European Organization for Nuclear Research shared the World Wide Web, is in the best traditions of civilization.

55. Globalization cannot be allowed to become the grand global casino where investors rig the system to guarantee that they always win. A democratic and equitable international order is not possible if this "Hotel Brave New World" is allowed to ensnare States, letting them check in but never leave. Since the siren call of foreign direct investment has proven deceptive, Governments must move away from easy mythologies and demand empirical evidence of job creation and reject a "race to the bottom" in human rights terms. With good will, States can adjust international investment agreements for their benefit.

56. Transnational enterprises operate in the territory of States that are bound to the Charter of the United Nations, akin to a world constitution, whose Purposes and Principles are paramount for the achievement of a democratic and equitable international order. Transnationals cannot create a new legal order beyond the Charter of the United Nations, nor be *legibus solutus* or exempt from the rule of law, general principles of law and basic codes of conduct. Transnationals do not exist in a vacuum and are bound by the international human rights regime. Even their most cherished impact on today's societies — creating jobs — is only possible thanks to laws that ensure the orderly functioning of market transactions, the clear assignment of property rights and reliance on effective courts. They operate in the context of accountability and checks and balances that took centuries to develop and cannot be waived. Wherever transnational corporations are registered or carry out operations, the home and host States have the responsibility to regulate them to prevent violations of human rights.

[50] www.icrc.org/eng/resources/documents/misc/57jq32.htm.

57. A State that fails to ensure the human rights of the population living under its jurisdiction is a failed State, even if it meets all its financial obligations. In order to prevent the emergence of a dystopian situation whereby a State cannot effectively protect human rights and transnational enterprises dictate public policy, States must reassert their sovereignty in a manner consistent with the Purposes and Principles of the United Nations, in particular with Articles 1 and 2 of the Charter of the United Nations. They must revise and, when necessary, terminate agreements that conflict with human rights.

58. Bearing in mind that the essence of capitalism and investment is risk taking, States must insist that investors accept the risk and subject themselves to national legislation in a manner similar to the Calvo doctrine,[61] which holds that jurisdiction in international investment disputes must lie with the country in which the investment is made. This doctrine has been adopted into the Constitutions of many Latin American States, and merits being used as a model for international investment agreements. Transnational enterprises cannot claim that State measures to protect the environment, health and hygiene standards entail unpredictable risks.

59. Modification or termination of international investment agreements may be a complex task, but much less problematic than, for example, dealing with armed conflict. The world economy has had to adjust time and again to advance the cause of human dignity. So it was with the prohibition of the lucrative slave trade, the abolition of slavery and decolonization, which were replaced by other economic models. For centuries slavery was the de facto economic model with implicit legality; colonialism was de facto the international order. Today these practices are seen as crimes against humanity. For decades, investor–State dispute settlement arbitrations have de facto upset the international order, but they cannot trump the Charter of the United Nations. Just as other economic paradigms were abandoned, eventually investor–State dispute settlement will be recognized as an experiment gone wrong, an attempted hijacking of constitutionality resulting in the retrogression of human rights. The consequences of not modifying or terminating bilateral investment treaties and free trade agreements are more serious than soberly accepting the necessity of revising them.

60. By way of conclusion, it would be appropriate to reaffirm that while free trade and investment agreements have their raison d'être, the primary role of the State is to act in the public interest. There are ample opportunities for corporations and investors to make legitimate profits and enter into genuine "partnerships" with States and not into asymmetrical relationships. The rule of thumb should be to: (a) give to corporations what belongs to them – an environment in which to compete fairly; (b) give back to States what is fundamentally and inalienably theirs – sovereignty and policy space; (c) give parliaments what belongs to them – the faculty to consider all aspects of treaties without undemocratic secrecy and fast-tracking; and (d) give to the people what is theirs: the rights to public participation, due process and democracy.

VII. Plan of action

61. Seventy years after the entry into force of the Charter of the United Nations, it is appropriate to reaffirm its Purposes and Principles which, pursuant to Article 103, prevail

[61] Patrick Juillard, "Calvo Doctrine/Calvo Clause", *Max Planck Encyclopaedia of Public International Law*, vol. I, pp. 1086–1093, Oxford, 2012. D. R. Shea, *The Calvo Clause: A Problem of inter-American and International Law and Diplomacy*, Minneapolis, 1955. C. K. Darymple, "Politics and foreign direct investment: the multilateral investment guarantee agency and the Calvo Clause", *Cornell International Law Review*, vol. 29, pp. 161–189.

over other treaties. Bearing in mind that a democratic and equitable international order can only be achieved gradually through the concerted action of States, national human rights institutions, intergovernmental organizations and civil society, the Independent Expert submits this preliminary plan of action with preventive and corrective recommendations.

62. To States:

(a) States must ensure that all trade and investment agreements — existing and future — represent the democratic will of the populations concerned. Negotiations on current drafts must not be secret or "fast-tracked", but, on the contrary, must be subject to public participation on the basis of independent human rights, health and environmental impact assessments;

(b) States should ensure that parliaments, national human rights institutions and ombudspersons are involved in the process of elaboration, negotiation, adoption and application of trade and investment agreements.

(c) States must ensure that all trade and investment agreements recognize the primacy of human rights and specify that, in case of conflict, human rights obligations prevail. States must uphold their erga omnes obligation to implement human rights treaties and observe ILO and WHO Conventions;

(d) States must exercise due diligence to minimize the risk of violating human rights through the adoption and operation of bilateral investment treaties and free trade agreements, and foreclose the danger of having to compensate foreign investors as a consequence of adopting necessary fiscal, financial and debt resolution measures or policies designed to respond to changing circumstances such as financial crises, new scientific findings or public demand for laws of general application;

(e) States that adhere to international investment agreements must ensure that a regulatory independent mechanism is also agreed upon, such as the office of an ombudsperson. Provision must be made for ex ante and ex post human rights and environmental impact assessments;

(f) States cannot compromise their obligation to ensure human rights by accepting investor–State dispute settlement agreements that allow investors to challenge the State's labour law, environmental legislation or health codes;

(g) States must ensure that international investment agreements do not undermine their ability to implement the industrial and macroeconomic policies needed for development, which is an essential objective of United Nations "constitutional" law, and take steps to revise promptly existing bilateral investment treaties and free trade agreements with negative effects on human rights. States should test existing bilateral investment treaties and free trade agreements for compliance under their respective Constitutions, and revise or terminate said agreements pursuant to the Vienna Convention on the Law of Treaties when they conflict with human rights obligations;

(h) States should keep essential services in governmental hands so as to ensure democratic transparency and accountability. Any privatization must be coupled with effective human rights safeguards;

(i) All future international investment agreements should provide for the settlement of disputes not by investor–State dispute settlement but by the national courts or a special international investment court, explicitly bound by the recognition of the primacy of human rights, public interest and national sovereignty;

(j) States should take measures to ensure implementation of the guiding principles on human rights impact assessments of trade and investment agreements and make them legally binding in the domestic legal order;

(k) States should monitor respect for the Guidelines on Business and Human Rights by all transnational enterprises operating in their territory and make them legally binding in the domestic legal order;

(l) States should partner with civil society actors to counteract the negative impact of free trade agreements on the enjoyment of human rights and provide for an enabling environment for civil society actors;

(m) States must deny effect to investor–State dispute settlement and ICSID awards that violate human rights, practice solidarity with States seeking to modify or terminate bilateral investment treaties, free trade agreements or investor–State dispute settlement agreements or that deny effect to arbitral awards, and take measures vis-à-vis investors and transnational corporations violating international human rights law;

(n) States victims of contra bonos mores investor–State dispute settlement arbitrations should organize a concerted response, jointly refuse implementation and convene an assembly of States parties to modify or terminate investor–State dispute settlement agreements with immediate effect and to revise or terminate application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards when the awards entail human rights violations;

(o) States should include in bilateral investment treaties and free trade agreements specific provisions on the legal responsibility of transnational corporations and investors to make reparation for environmental, health and other damage caused by their activities, and strengthen domestic criminal law provisions so as to address personal criminal liability of investors and corporation executives for environmental harm or gross human rights violations. To this end, States should establish a monitoring mechanism to assess investor compliance with human rights;

(p) States should invoke Article 96 of the Charter of the United Nations and request the General Assembly to refer pertinent legal questions to the International Court of Justice for advisory opinions.

63. To parliaments:

(a) Bearing in mind that in representative democracies parliaments are the trustees of the will of the people, parliamentarians must consult with their constituents, proactively inform and seek the opinion of all sectors of the population, particularly those likely to be affected by international investment agreements. Fast-tracking treaties is incompatible with the democratic process and results in illegitimate treaties;

(b) Parliaments must ensure that international investment agreements contain general provisions on their periodic review and amendment, as well as provisions for termination, withdrawal or suspension without unreasonable "survival clauses";

(c) Parliaments must ensure that bilateral investment treaties and free trade agreements advance food security, education, health, sanitation social and economic policies and decide on domestic budgetary and fiscal matters;

(d) Parliamentarians should resist the siren call of lobbies for transnational enterprises that make over-optimistic projections of growth and development. Parliamentarians must demand independent economic studies and independent human rights impact assessments;

(e) Parliamentarians should resist attempts to privatize essential governmental services, including the provision of safe water and sanitation;

(f) Regional parliaments and parliamentary assemblies should address the dangers to human rights of bilateral investment treaties and free trade agreements, including

ways to repeal and/or modify them according to the Vienna Convention on the Law of Treaties.

64. To transnational enterprises and investors: transnational enterprises must accept the adoption of State measures to implement progressively the rights contained in the International Covenant on Economic, Social and Cultural Rights and factor them in as a cost of doing business. They must refrain from interfering in a State's function to legislate in the public interest in implementation of human rights treaty obligations.

65. To civil society, national human rights institutions, universities and religious institutions:

(a) Civil society organizations and universities should revisit the dogmas of market fundamentalism and test empirically the extent to which existing international investment agreements have fostered or hindered the enjoyment of human rights;

(b) Individuals and groups should reclaim their democratic right to participate in decision-making in the determination of governmental budgetary, fiscal, economic, trade and social policies. They should demand the primacy of human rights over investment privileges and vindicate the social contract, as reflected in an index of public satisfaction composed of both material and non-material indicators;

(c) Individuals and groups should demand periodic review of the success or otherwise of international investment agreements. When treaties conflict with human rights, they must be revised, amended or terminated;

(d) Individuals and groups should demand transparency and accountability from their elected officials, particularly with regard to the elaboration, negotiation, adoption and application of trade and investment agreements;

(e) Individuals and groups should engage national courts to determine the constitutionality of existing bilateral investment treaties and free trade agreements and to define the parameters of possible future agreements;

(f) Individuals and groups should assert their rights by invoking the jurisdiction of regional human rights courts, and asking them to investigate and denounce violations of the civil, cultural, economic, political and social rights resulting from the application of international investment agreements or the implementation of investor–State dispute settlement awards;

(g) Law schools should include ethics in their curricula and teach prospective lawyers and arbitrators that they have a duty to serve society and uphold the letter and spirit of the law. They cannot aid and abet any system whose foreseeable consequences are the erosion of human rights and environmental standards. Students should see investment law as part of a legal framework that includes human rights. Law is not a game and the goal is not to "win" but to serve justice, aware that positivism in law must integrate human dignity. No one should seek to profit from injustice;

(h) Religious institutions should join forces to assess the compliance of bilateral investment treaties and free trade agreements with human rights law and standards, and where relevant promote ways to modify or terminate those treaties that adversely impact on human rights;

(i) National human rights institutions should advise States against entering bilateral investment treaties or free trade agreements that do not guarantee State sovereignty and regulatory space. National human rights institutions should advise States on how to modify or terminate treaties that hinder the implementation of human rights.

66. To the Human Rights Council :

(a) The new Forum on Human Rights, Democracy and the Rule of Law should devote a session to the human rights impacts of bilateral investment treaties and free trade agreements. This Forum may elaborate a plan of action to address existing problems and recommend implementable solutions, including the phasing out of investor–State dispute settlement and either reverting to national tribunals or replacing investor–State dispute settlement by the creation of an independent and transparent international investment court with permanent judges bound by a statute that prioritizes human rights and disallows one-way jurisdiction, so that not only investors but also States have standing to sue;

(b) The Human Rights Council should systematically use its universal periodic review procedure to inquire into the impact of bilateral investment treaties and free trade agreements on the enjoyment of human rights;

(c) The Council should consider tasking OHCHR with a global online consultation on the issue of adverse impacts of free trade and investment agreements on the enjoyment of human rights so as to provide input to the Accountability and Remedy Project, and allocate additional funds for this consultation;

(d) The Council should consider referring matters to the United Nations Security Council and to United Nations specialized agencies like the Food and Agriculture Organization of the United Nations, ILO, WHO and the United Nations Children's Fund and study the possibility of requesting injunctive relief to prevent the violation of civil, cultural, economic, political and social rights.

67. To United Nations agencies and subsidiary organs :

(a) UNCTAD should consider convening a conference to explore the possibilities of revising or terminating existing bilateral investment treaties and free trade agreements that contain provisions that have interfered with the State's duty to legislate human rights, implement economic policies and regulate in the public interest. Such a conference should advance the UNCTAD "action menu" and "road map" for reform;

(b) UNCTAD and OHCHR should provide advisory services and technical assistance how to reverse the negative human rights impacts of bilateral investment treaties and free trade agreements and how to compensate victims;

(c) All United Nations agencies and subsidiary organs should put international investment agreements on their agenda and offer advisory services and technical assistance to States considering such agreements to ensure the protection of all human rights, including the rights to food, health, minimum wage, improved labour standards, gender equality and the rights of the child. In relevant ICSID and investor–State dispute settlement arbitrations they should submit amicus curiae briefs. They should use their competence under Article 96 (2) of the Charter of the United Nations to request pertinent advisory opinions from the International Court of Justice;

(d) WTO should integrate human rights into its mission statement and ensure that its dispute settlement mechanism fosters human rights;

(e) As the core legal body of the United Nations system in the field of international trade law, UNCITRAL[62] should mainstream human rights into its activities, in particular strengthen its transparency rules and ensuring that arbitrations systematically take obligations under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights into account and refrain

[62] www.uncitral.org/, www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf, www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf

from undermining human rights, national policy space and environmental protection measures. Arbitrations must migrate from the private law paradigm to a public law framework which promotes general interests.

VIII. Postscript

68. The Independent Expert is grateful that enhanced recognition of the mandate is leading to increased input from Governments, national human rights institutions, civil society and academia. He welcomes contact with stakeholders from all related fields and looks forward to engaging with them in the upcoming reporting year.

69. By way of conclusion, the Independent Expert would like to reiterate his expression of appreciation to the very hard-working and competent OHCHR staff, and request the General Assembly to allocate greater resources to OHCHR.

Annex

[English only]

Selected Activities

Participation at side-events during the 27th, 28th and 29th sessions of the HR Council and side-events during UPR sessions.

- 9 October 2014: Keynote speaker at the Erskine Childers lecture on the right to peace, London.
- 23–24 October: Participation in two panels of the International Law Association, on international governance and geo-engineering, and on new Special Procedures mandates, New York.
- 6–9 December: Conference on the humanitarian impact of nuclear weapons, Vienna.
- 13 December: "Parliaments and the United Nations", United Nations Association, Bern.
- 27 January 2015: bilateral consultation with trade experts at South Centre, Geneva.
- 10 February: Panel discussion, "Combating Violence and Discrimination against Women, Carter Center, Atlanta.
- 11–12 February: Conference on Democracy and democratic elections, including bilateral meeting with President Carter, Atlanta.
- 19 March: Symposium on Unilateral Sanctions, Legal Policy and Business Challenges, London Centre of International Law Practice, London.
- 20–21 April: Consultation convened by the Independent Expert on human rights and international solidarity, Geneva
- 20–24 April: Participation in the open-ended inter-governmental working group on the right to peace.
- 27 April: Video message to Women's International League for Peace and Freedom (WILPF)'s Conference on Peace, The Hague.
- 28 April: Bilateral consultations with trade experts at IPU, Geneva.
- 4 May: Bilateral consultations with trade experts at ILO and WHO
- 5 May: Expert consultation on free trade and investment agreements, Geneva (see Appendix 2).
- 19 May: Conference on unilateral economic sanctions, Institute of Democracy and Cooperation, Paris.
- 8–12 June: Annual meeting of Special Procedures mandate holders, Geneva.

Questionnaire of the Independent Expert on the promotion of a democratic and equitable international order

(1) In your views, do free trade and investment agreements promote or obstruct an international order that is more democratic and equitable? Can you provide positive or negative examples of the effects of free trade and investment agreements

on human rights, including labour standards, prohibition of child labour, minimum wage levels, vacation and pension entitlements, gender equality etc.?

(2) How do States ensure that the genuine will of the people is respected when free trade and investment agreements are elaborated, negotiated, ratified and implemented?

(3) How do States ensure that the distribution of benefits and wealth derived from free trade and investment agreements is proportional to all its parties, as well as third-parties that may also be impacted? In particular what fiscal measures are in place to ensure that profits are legitimately taxed and to prevent the use of tax havens or tax avoidance schemes.

(4) To what extent can affected groups be identified and consulted in order to mitigate potential adverse effects of these agreements on their human rights? To what extent are all stakeholders consulted, including labour unions, syndicates, environmental protection organizations, health professionals, ombudsmen?

(5) How can Parliaments ensure transparency and accountability in the process of elaboration, negotiation, ratification and implementation of trade and investment agreements to ensure that human rights are respected, protected and fulfilled?

(6) What recommendations could be provided as guiding principles to strengthen disclosure of information to enable meaningful participation in the decision-making process in relation to these agreements?

(7) Have opinion polling and referenda been used before the adoption of past trade and investment agreements, and how could these mechanisms be effectively employed in current negotiations?

(8) To the extent that globalization impacts all States, whether parties of free trade and investment agreements or not, how can the democratic participation of all States in global decision-making processes be advanced?

(9) To what extent do free trade agreements or investment agreements compromise the sovereignty of States over domestic policy decisions on the protection of public health, the environment, promotion of local industries and agriculture? Are there human rights clauses or provision for exceptions to ensure the respect of human rights?

(10) What jurisdiction is competent to judge alleged breaches of a free trade or investment agreement? What are the appeal possibilities? What kind of sanctions can be imposed?

(11) In States parties to free trade and investment agreements, what recourses and remedies are available to States, corporations, groups and individuals, including indigenous peoples, in case human rights are violated?

Concept Note of the Consultation on the impact of free trade and investment agreements on an equitable and democratic international order, 5 May 2015

1. Background

1. The mandate of the Independent Expert was created by Human Rights Council resolution 18/6 in September 2011. Subsequent resolutions 21/9, 25/15 and 27/9 have complemented the mandate's terms of reference. The first, and current, mandate holder, Mr. Alfred de Zayas, was appointed effective 1 May 2012. To date, the Independent Expert

has presented three substantive reports to the Human Rights Council and three reports to the General Assembly on various issues falling within his mandate including on fostering full, equitable and effective participation in conduct of public affairs; the adverse impacts of military expenditures on a democratic international order; the right of self-determination, as well as initiatives and mechanisms promoting the right to peace, international cooperation, and enhanced participation of States and civil society in global decision-making.

2. In resolution A/HRC/RES/25/15, the Human Rights Council calls upon Members states "to fulfil their commitment … to maximize the benefits of globalization through, inter alia, the strengthening and enhancement of international cooperation to increase equality of opportunities for trade, economic growth and sustainable development…", reiterating "… that only through broad and sustained efforts to create a shared future based upon our common humanity and all its diversity can globalization be made fully inclusive and equitable."

3. In recent years, globalization has fostered trade as well as cultural and human exchange, which ultimately has benefitted economic growth. Globalization has provided opportunities for improved standards of living and poverty reduction, but it has also caused unemployment in some sectors, dismantled local industries and triggered population movements and migration. Moreover, the increasing influence of trade in global, regional and bilateral relations between States has in many instances led to growing inequalities both between States and within States. While globalization has allowed for the empowerment of individuals and communities in various domains, the increased rapidity of trade liberalization today, especially in terms of financial flows and corporations' influential capacity, renders it pertinent to examine the continuing effects of trade and investment agreements on a democratic and equitable international order.

4. Accordingly, the Independent Expert intends to examine the impact of free trade and investment agreements on a democratic and equitable international order in his upcoming reports to the Human Rights Council and to the General Assembly.

5. As part of the process of elaborating these reports, the Independent Expert is convening a one-day expert consultation on 5 May 2015 in Geneva, Switzerland.

2. Objectives

6. The consultation intends to:

(i) Seek the views of experts on the impact of free trade and investment agreements on the protection and promotion of human rights and the promotion of a democratic and equitable international order;

(ii) Explore ways in which globalization in trade-related areas could advance, rather than hinder, the realization of an international order that is more democratic and more equitable;

(iii) Gather suggestions for concrete and pragmatic recommendations for his reports to the Human Rights Council and General Assembly.

3. Expected outcome

7. The expected outcome of this meeting is to provide inputs and suggestions to inform the Independent Expert's 2015 reports to the Human Rights Council and the General Assembly. Participants are encouraged to put forward possible recommendations for inclusion in these reports. Written submission before or after the consultation are welcome.

4. Thematic focus

8. The meeting is expected to address the following issues:

Public participation

9. The level of proactive information provided by governments and transnational enterprises and financiers in the process of elaboration, negotiation and adoption of free trade and investment agreements and the opportunity of the public to meaningfully participate in the process are often not compliant with article 25 of the ICCPR. The rapid adoption of these agreements in parliaments with little consultation or participation, often influenced by lobbyists, prevents the electorate from voting on issues that affect them directly.

10. For this reason it is imperative to examine the role of Parliaments in monitoring the elaboration, negotiation and adoption of these agreements, their responsibility to legislate for the public interest notwithstanding FTAs, their power of modification and/or termination of FTA agreements that conflict with the proper exercise of State competences in protecting the environment, health and labour standards. The role of Parliaments in regulating the activities of transnational enterprises, especially in areas of environmental protection and health standards will also be discussed.

5. Impact on human rights

11. Existing and proposed free trade and investment agreements have far-reaching effects on human rights. International agreements impact the rights to employment and labour, the right to health, the right to food, and the right to a safe, clean, healthy and sustainable environment. The normative framework to be examined will include the United Nations Charter, the two human rights covenants, the conventions on the rights of the child, the convention on migrant workers, the ILO Conventions on labour standards, WHO Conventions including the Framework Convention on Tobacco Control, and soft law resolutions and declarations including the 1998 ILO Declaration on Fundamental Principles and Rights at Work, the Guidelines on Business and Human Rights and the Declaration on the Right to Development.

12. A review of human rights concerns that have arisen in the past on the basis of the experience with free trade and investment agreements, especially concerning States' obligation to adopt measures to progressively advance economic, social and cultural rights will notably be discussed. The "chilling effect" of the threat of costly Investor State Dispute Settlements (ISDS) arbitrations, which may deter States in adopting social legislation, will also be explored. The question arises whether transnational corporations can ever be allowed to hinder the competence of States to legislate in the public interest, and whether States can waive their competences without negating the ontological nature of the sovereign State as understood in the UN Charter.

13. Participants will examine the pertinence of human rights impact assessments in the process of elaboration of free trade and investment agreements, as well as the usefulness of subsequent or follow-up human rights impact assessment.

6. Reviewing the primacy of human rights treaty obligations over Free Trade and Investment Agreements

14. During the consultation, participants will be able to express their views on the primacy of the UN Charter and in particular its human rights provisions over other treaties (Cf. Art. 103 of the UN Charter). The discussion should also address experiences with the use of exception clauses or clauses that allow States to legislate in the public interest without fearing financial consequences before ISDS Tribunals. To the extent that free trade

and investment agreements hinder the State's function of legislating in the public interest and result in violations of human rights treaties including ICCPR, ICESCR, ILO and WHO Conventions, they may be considered contra bonos mores and as such null and void pursuant to article 53 of the Vienna Convention on the Law of Treaties (CVLT). Customary international law on these issues should be revisited, including general principles of law (Art. 38 ICJ statute) including good faith (Art. 26 Vienna Convention on the Law of Treaties) and the concept of abuse of rights contained in the legislation of many countries.

15. A review of the establishment of ISDS Tribunals and issues of conflict of interests and a review of the jurisprudence of ISDS arbitrations, including the possibilities of challenging arbitration awards will be discussed. In particular, the possibility and modalities of refusing implementation of arbitration awards and the consequence of such refusal will be explored, as well as the experience made by States in suing transnational corporations for environmental damage (the polluter pays principles) and endangering public health. In this context participants should consider whether the establishment of parallel systems of dispute settlement are compatible with the State's obligation to ensure that suits at law are examined by independent tribunals. Separate and unaccountable dispute settlement mechanisms seem to be contrary to the rule of law, in particular to article 14(1) ICCPR.

7. Pragmatic recommendations to make globalization work for human rights

16. Global challenges include privatization, the role of the World Bank and its International Center for Settlement of Investment Disputes, the WTO and the IMF, foreign debt management, default, unilateral sanctions, extraterritorial application of laws, etc.

17. Participants will discuss general issues about the impact of globalisation on human rights, including the ideas of taxation of transnational enterprises and phasing-out of tax havens and formulate recommendations thereon.

18. Among possible recommendations are the modification or termination of free trade and investment agreements that have led to violations of human rights. Participants consider the grounds for denunciation, invalidity, suspension, modification or termination of treaties laid down in the VCLT, including error (art. 48), fraud (art. 49), corruption (art. 50), coercion (arts. 51 and 52), conflict with peremptory norms (art. 53), implied right of denunciation or withdrawal (art. 56), breach (art. 60), supervening impossibility of performance (art. 61), fundamental change of circumstances (art. 62), emergence of a new jus cogens norm (art. 64), and the procedure to follow (arts. 65 et seq.)

19. Participants may also consider the feasibility for the General Assembly or some other body such as the ILO or WHO to request advisory opinions from the International Court of Justice on the primacy of human rights over FTAs and on available mechanisms to provide redress to victims.

Guiding Principles on business and human rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework – excerpts

20. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011.

Guiding principle 9

States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

Commentary

Economic agreements concluded by States, either with other States or with business enterprises — such as bilateral investment treaties, free trade agreements or contracts for investment projects — create economic opportunities for States. But they can also affect the domestic policy space of Governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.

Guiding principle 25

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/29/28 – excerpts

Transparency in investment arbitration

21. A significant opportunity for increasing transparency in the area of investor-State arbitration has arisen from work of the Working Group on Arbitration and Conciliation of the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Working Group started working on transparency in 2010, with a mandate that stressed the importance of ensuring transparency in investor-State dispute settlements (A/6317, para. 314). In a written submission in support of that mandate, a Member State observed that the lack of transparency in investor-State arbitration was contrary to the fundamental principles of good governance and human rights upon which the United Nations is founded (see A/CN.9/662, para. 20). That work has culminated in two major texts: (a) the rules on transparency in treaty-based investor-State arbitration, which came into effect on 1 April 2014; and (b) a convention on transparency[63] (the United Nations Convention on Transparency), which was finalized by the Commission in July 2014 and opened for signature on 17 March 2015. The Working Group on the issue of human rights and transnational corporations and other business enterprises welcomes these new transparency rules.

22. Both the Guiding Principles and the UNCITRAL work on transparency back procedural and legal transparency and take a practical approach to achieving that aim. The new UNCITRAL rules on transparency seek to address a regular concern with investor-State dispute settlement cases – namely that their typically confidential and non-

[63] A/CN.9/812 and www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf. The Working Group chairperson was invited to speak at the March 2015 signing ceremony.

participatory nature does not allow for involvement by affected stakeholders, or for an adequate balance between the need for States to ensure that they retain adequate policy and regulatory ability to protect human rights and provide investor protection, as clarified in Guiding Principle 9. With the new UNCITRAL rules and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, States have a practical means to promote good governance and respect for human rights with a broader policy framework that is aligned with the Guiding Principles.[64]

23. These rules, when they apply, provide a transparent procedural regime under which investment treaty arbitrations are conducted. They can be used in investor-State arbitrations initiated under UNCITRAL arbitration rules, as well as under other institutional arbitration rules or in ad hoc proceedings. States can now incorporate them into investment treaties concluded on or after 1 April 2014, but for the rules to apply to disputes arising under the more than 3,000 investment treaties concluded before that date, the States parties to a treaty, or disputing parties in an investor-State arbitration, would need to agree to apply the rules under that treaty or to that dispute. This highlights the importance of the Convention on Transparency, which provides an efficient, multilateral mechanism by which States can agree, subject to relevant reservations, to apply the rules to all arbitrations arising under their investment treaties concluded before 1 April 2014. The Working Group welcomes the rules and considers that an obvious step for States to remedy incoherence between current modes of investment with norms for good governance and human rights considerations, including those set out in the Guiding Principles, would be to sign and ratify the Convention.

24. The Working Group is pleased to have had the opportunity to engage with UNCITRAL, including at its forty-seventh session in July 2014, and to note that in the report of that session the Commission agreed that the UNCITRAL secretariat should monitor developments in the area of business and human rights, in cooperation with relevant bodies within the United Nations and beyond and inform the Commission about developments of relevance to UNCITRAL work (see A/69/17, para. 204).

Guiding principles on human rights impact assessments of trade and investment agreements, A/HRC/19/59/Add.5 – excerpts

25. All States should prepare human rights impact assessments prior to the conclusion of trade and investment agreements.

26. States must ensure that the conclusion of any trade or investment agreement does not impose obligations inconsistent with their pre-existing international treaty obligations, including those to respect, protect and fulfil human rights.

27. Human rights impact assessments of trade and investment agreements should be prepared prior to the conclusion of the agreements and in time to influence the outcomes of the negotiations and, if necessary, should be completed by ex post impact assessments. Based on the results of the human rights impact assessment, a range of responses exist where an incompatibility is found, including but not limited to the following:

(a) Termination of the agreement;

(b) Amendment of the agreement;

[64] http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/transparency-in-investment-treaty-arbitration-and-the-un-guiding-principles-on-business-and-human-rights-the-new-uncitral-rules-and-convention-on-transparency/.

(c) Insertion of safeguards in the agreement;

(d) Provision of compensation by third-State parties;

(e) Adoption of mitigation measures.

28. Each State should define how to prepare human rights impact assessments of trade and investment agreements it intends to conclude or has entered into. The procedure, however, should be guided by a human rights-based approach, and its credibility and effectiveness depend on the fulfilment of the following minimum conditions:

(a) Independence;

(b) Transparency;

(c) Inclusive participation;

(d) Expertise and funding; and

(e) Status.

29. While each State may decide on the methodology by which human rights impact assessments of trade and investment agreements will be prepared, a number of elements should be considered:

(a) Making explicit reference to the normative content of human rights obligations;

(b) Incorporating human rights indicators into the assessment; and

(c) Ensuring that decisions on trade-offs are subject to adequate consultation (through a participatory, inclusive and transparent process), comport with the principles of equality and non-discrimination, and do not result in retrogression.

30. States should use human rights impact assessments, which aid in identifying both the positive and negative impacts on human rights of the trade or investment agreement, to ensure that the agreement contributes to the overall protection of human rights.

31. To ensure that the process of preparing a human rights impact assessment of a trade or investment agreement is manageable, the task should be broken down into a number of key steps that ensure both that the full range of human rights impacts will be considered, and that the assessment will be detailed enough on the impacts that seem to matter the most:

(a) Screening;

(b) Scoping;

(c) Evidence gathering;

(d) Analysis;

(e) Conclusions and recommendations; and

(f) Evaluation mechanism.

International Labour Organisation Declaration on Fundamental Principles and Rights at Work and its Follow-Up, adopted by the International Labour Conference at its eighty-sixth session, Geneva, 18 June 1998 (Annex revised 15 June 2010) – excerpts

"2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;

(b) the elimination of all forms of forced or compulsory labour;

(c) the effective abolition of child labour; and

(d) the elimination of discrimination in respect of employment and occupation."

Declaration of Santa Cruz, Bolivia, 17 June 2014 – excerpts

In its Declaration, the 134 members of the Group of 77 expressed their concern about the negative impact of certain trade agreements on developing countries:

64. We note with great concern that non-communicable diseases have become an epidemic of significant proportions, undermining the sustainable development of member States. In that sense, we acknowledge the effectiveness of tobacco control measures for the improvement of health. We reaffirm the right of member States to protect public health and, in particular, to ensure universal access to medicines and medical diagnostic technologies, if necessary, including through the full use of the flexibilities in the Doha Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Public Health.

169. We believe that trade rules, in WTO or in bilateral and regional trade agreements, should enable developing countries to have sufficient policy space so that they can make use of policy instruments and measures that are required for their economic and social development. We reiterate our call for the effective strengthening of the special and differential treatment and less than full reciprocity principles and provisions in WTO so as to broaden the policy space of developing countries and enable them to benefit more from the multilateral trading system. We also call for bilateral trade and investment agreements involving developed and developing countries to have sufficient special and differential treatment for developing countries to enable them to retain adequate policy space for social and economic development.

UNCTAD Database of Investor-State Dispute Settlement (ISDS) in 2014[65]

Case title	*Year the case was initiated*	*Respondent State*	*Home State of investor (claimant)*	*Legal Instrument*	*Arbitration Rules*	*Outcome Status of proceedings*
ATTY Ltd v. Czech Republic	2014	Czech Republic	United Kingdom	Czech Republic-UK BIT	UNCITRAL	Pending
Albaniabeg Ambient Sh.p.k. M. Angelo Novelli and Costruzioni S.r.l. v. Republic of Albania (ICSID Case No. ARB/14/26)	2014	Albania	Italy	Energy Charter Treaty	ICSID	Pending
Alpiq AG v. Romania (ICSID Case No. ARB/14/28)	2014	Romania	Switzerland	Switzerland-Romania BIT, Energy Charter Treaty	ICSID	Pending
Anglia Auto Accessories, Ivan Peter Busta and Jan Peter Busta v. Czech Republic	2014	Czech Republic	United Kingdom	Czech Republic-UK BIT	SCC	Pending
Anglo American PLC v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/14/1)	2014	Venezuela, Bolivarian Republic of	United Kingdom	United Kingdom-Venezuela BIT	ICSID AF	Pending
Ansung Housing Co., Ltd. v. People's Republic of China (ICSID Case No. ARB/14/25)	2014	China	Korea, Republic of	China-Republic of Korea BIT (2007)	ICSID	Pending
Ayoub-Farid Saab and Fadi Saab v. Cyprus	2014	Cyprus	Lebanon	Cyprus-Lebanon BIT	ICC	Pending
Bear Creek Mining Corporation v. Republic of Peru (ICSID Case No. ARB/14/21)	2014	Peru	Canada	Canada-Peru FTA	ICSID	Pending
Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen (ICSID Case No. ARB/14/30)	2014	Yemen	China	China-Yemen BIT	ICSID	Pending
Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic (ICSID Case No. ARB/14/3)	2014	Italy	Belgium; France; Germany	Energy Charter Treaty	ICSID	Pending
Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic (ICSID Case No. ARB/14/32)	2014	Argentina	Austria	Argentina-Austria BIT	ICSID	Pending
CEAC Holdings Limited v. Montenegro (ICSID Case No. ARB/14/8)	2014	Montenegro	Cyprus	Cyprus-Serbia and Montenegro BIT	ICSID	Pending
Cem Uzan v. Republic of Turkey	2014	Turkey	Data not available	Energy Charter Treaty	SCC	Pending

[65] http://unctad.org/en/Pages/DIAE/ISDS.aspx

Case title	*Year the case was initiated*	*Respondent State*	*Home State of investor (claimant)*	*Legal Instrument*	*Arbitration Rules*	*Outcome Status of proceedings*
City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine (ICSID Case No. ARB/14/9)	2014	Ukraine	Netherlands	Netherlands-Ukraine BIT	ICSID	Pending
Corona Materials, LLC v. Dominican Republic (ICSID Case No. ARB(AF)/14/3)	2014	Dominican Republic	United States of America	CAFTA	ICSID AF	Pending
Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic (ICSID Case No. ARB/14/16)	2014	Greece	Cyprus	Cyprus-Greece BIT	ICSID	Pending
David Aven, Samuel Aven, Carolyn Park, Eric Park, Jeffrey Shioleno, Giacomo Buscemi, David Janney and Roger Raguso v. Costa Rica	2014	Costa Rica	United States of America	CAFTA	UNCITRAL	Pending
Elektrogospodarstvo Slovenije - razvoj inzeniring d.o.o. v. Bosnia and Herzegovina (ICSID Case No. ARB/14/13)	2014	Bosnia and Herzegovina	Slovenia	Energy Charter Treaty, Bosnia Herzegovina-Slovenia BIT	ICSID	Pending
EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic (ICSID Case No. ARB/14/14)	2014	Slovakia	Canada, United States of America	Slovakia/Czechoslovakia -US BIT, Canada-Slovakia BIT	ICSID	Pending
Highbury International AVV, Compañia Minera de Bajo Caroni AVV, and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/14/10)	2014	Venezuela, Bolivarian Republic of	Netherlands	Netherlands-Venezuela BIT	ICSID	Pending
IBT Group LLC, Constructor, Consulting and Engineering (Panama) SA and International Trade and Business and Trade, LLC v. Republic of Panama (ICSID Case No. ARB/14/33)	2014	Panama	United States of America	Panama-US BIT	ICSID	Pending
Infinito Gold Ltd. v. Republic of Costa Rica (ICSID Case No. ARB/14/5)	2014	Costa Rica	Canada	Canada-Costa Rica BIT	ICSID	Pending
InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain (ICSID Case No. ARB/14/12)	2014	Spain	United Kingdom	Energy Charter Treaty	ICSID	Pending
Ioan Micula, Viorel Micula and others v. Romania (ICSID Case No. ARB/14/29)	2014	Romania	Sweden	Romania-Sweden BIT	ICSID	Pending
JML Heirs LLC and J.M. Longyear LLC v. Canada	2014	Canada	United States of America	NAFTA	Data not available	Pending
Krederi Ltd. v. Ukraine (ICSID Case No. ARB/14/17)	2014	Ukraine	United Kingdom	Ukraine-UK BIT	ICSID	Pending

Case title	*Year the case was initiated*	*Respondent State*	*Home State of investor (claimant)*	*Legal Instrument*	*Arbitration Rules*	*Outcome Status of proceedings*
Louis Dreyfus Armateurs v. India	2014	India	France	France-India BIT	UNCITRAL	Pending
Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain (ICSID Case No. ARB/14/1)	2014	Spain	Netherlands	Energy Charter Treaty	ICSID	Pending
Michael Dagher v. Republic of the Sudan (ICSID Case No. ARB/14/2)	2014	Sudan	Jordan, Lebanon	Jordan-Sudan BIT, Lebanon-Sudan BIT	ICSID	Pending
NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain (ICSID Case No. ARB/14/11)	2014	Spain	Netherlands	Energy Charter Treaty	ICSID	Pending
Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia (ICSID Case No. ARB/14/15)	2014	Indonesia	Netherlands	Indonesia-Netherlands BIT	ICSID	Discontinued (for unknown reasons)
Oded Besserglik v. Republic of Mozambique (ICSID Case No. ARB(AF)14/2)	2014	Mozambique	South Africa	Mozambique - South Africa BIT	ICSID AF	Pending
Red Electrica Internacional SAU v. Bolivia	2014	Bolivia, Plurinational State of	Spain	Spain-Bolivia BIT	UNCITRAL	Settled
RENERGY S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/14/18)	2014	Spain	Data not available	Energy Charter Treaty	ICSID	Pending
RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain (ICSID Case No. ARB/14/34)	2014	Spain	Germany	Energy Charter Treaty	ICSID	Pending
Sodexo Pass International SAS v. Hungary (ICSID Case No. ARB/14/20)	2014	Hungary	France	France-Hungary BIT	ICSID	Pending
Tarique Bashir and SA Interpetrol Burundi v. Republic of Burundi (ICSID Case No. ARB/14/31)	2014	Burundi	Belgium	Belgium/Luxembourg-Burundi BIT	ICSID	Pending
Union Fenosa Gas, S.A. v. Arab Republic of Egypt (ICSID Case No. ARB/14/4)	2014	Egypt	Spain	Egypt-Spain BIT	ICSID	Pending
United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia (ICSID Case No. ARB/14/24)	2014	Estonia	Netherlands	Estonia-Netherlands BIT	ICSID	Pending
VICAT v. Republic of Senegal (ICSID Case No. ARB/14/19)	2014	Senegal	France	France-Senegal BIT	ICSID	Pending
Vodafone International Holdings BV v. India	2014	India	Netherlands	India-Netherlands BIT	UNCITRAL	Pending

Case title	Year the case was initiated	Respondent State	Home State of investor (claimant)	Legal Instrument	Arbitration Rules	Outcome/Status of proceedings
Zelena N.V. and Energo-Zelena d.o.o Indija v. Republic of Serbia (ICSID Case No. ARB/14/27)	2014	Serbia	Belgium	Belgium/Luxembourg-Serbia BIT	ICSID	Pending

UNCTAD Investment Policy Framework for Sustainable Development – excerpt[66]

Core Principles for investment policymaking for sustainable development

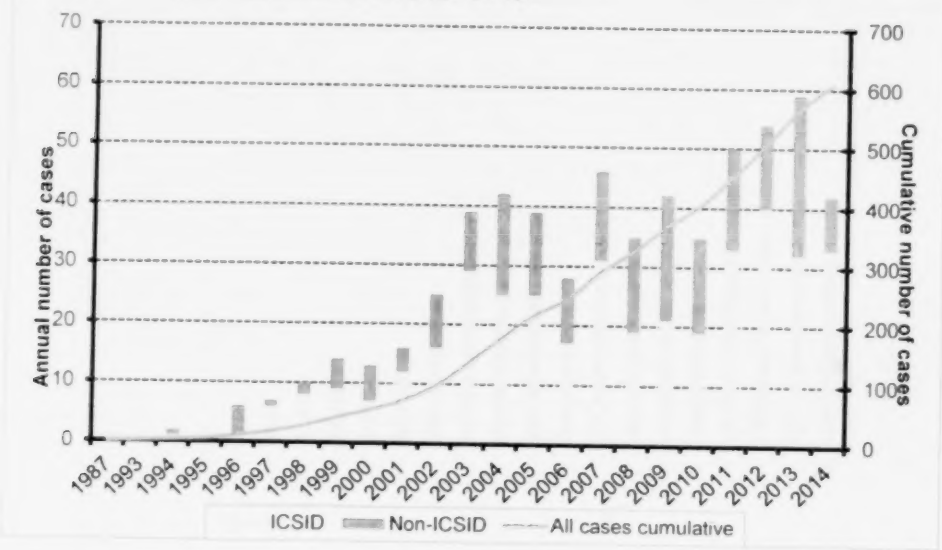
	Area	Core Principles
1	Investment for sustainable development	• The overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development.
2	Policy coherence	• Investment policies should be grounded in a country's overall development strategy. All policies that impact on investment should be coherent and synergetic at both the national and international level.
3	Public governance and institutions	• Investment policies should be developed involving all stakeholders, and embedded in an institutional framework based on the rule of law that adheres to high standards of public governance and ensures predictable, efficient and transparent procedures for investors.
4	Dynamic policymaking	• Investment policies should be regularly reviewed for effectiveness and relevance and adapted to changing development dynamics.
5	Balanced rights and obligations	• Investment policies should be balanced in setting out rights and obligations of States and investors in the interest of development for all.
6	Right to regulate	• Each country has the sovereign right to establish entry and operational conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects.
7	Openness to investment	• In line with each country's development strategy, investment policy should establish open, stable and predictable entry conditions for investment.
8	Investment protection and treatment	• Investment policies should provide adequate protection to established investors. The treatment of established investors should be non-discriminatory in nature.
9	Investment promotion and facilitation	• Policies for investment promotion and facilitation should be aligned with sustainable development goals and designed to minimize the risk of harmful competition for investment.

[66] http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-IPFSD.aspx

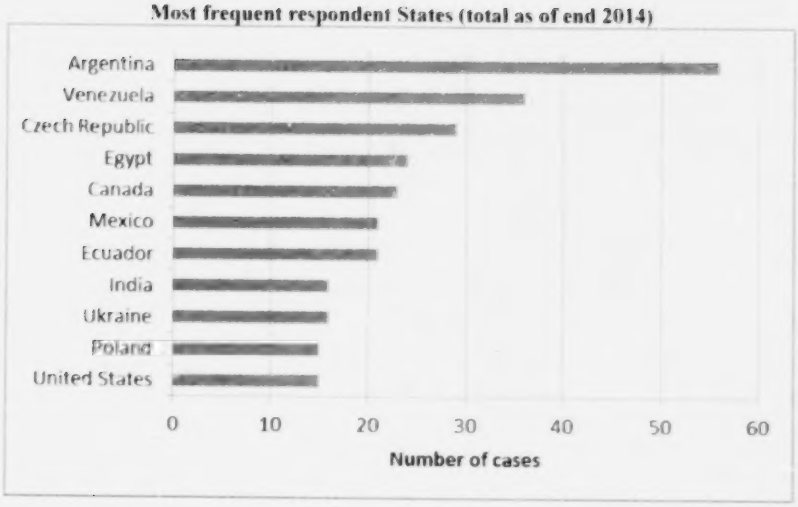
	Area	Core Principles
10	Corporate governance and responsibility	• Investment policies should promote and facilitate the adoption of and compliance with best international practices of corporate social responsibility and good corporate governance.
11	International cooperation	• The international community should cooperate to address shared investment-for-development policy challenges, particularly in least developed countries. Collective efforts should also be made to avoid investment protectionism.

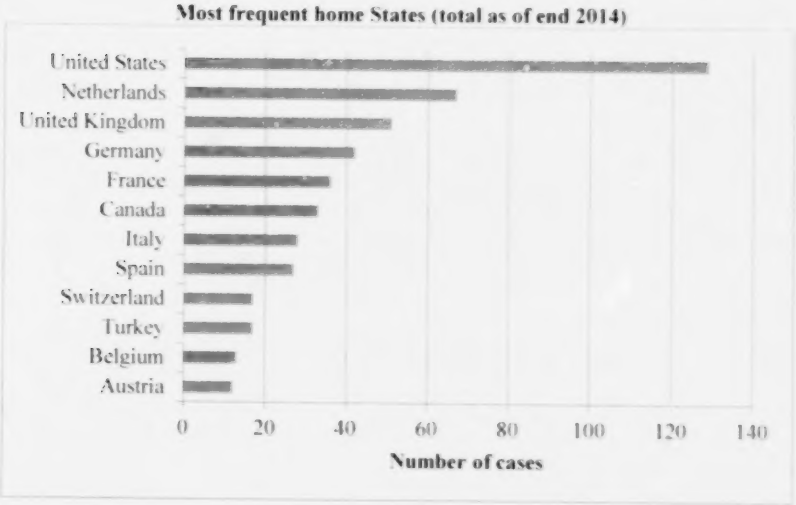
UNCATD IIA Issues Note No. 2, Investor-State Dispute Settlement: Review of Developments in 2014, May 2015[67]

Known ISDS cases, annual and cumulative (1987–2014)



[67] http://investmentpolicyhub.unctad.org/Upload/Documents/UNCTAD_WEB_DIAE_PCB_2015_%202%20IIA%20ISSUES%20NOTESMAY%20evening.pdf





UNCTAD Expert Meeting on the Transformation of the International Investment Agreement Regime: The Path Ahead, 25–27 February 2015 – excerpts[68]

Item 3 Transformation of the international investment agreement regime

4. Pursuant to the terms of reference agreed by the Extended Bureau of the Trade and Development Board in September 2014, the experts will discuss the path ahead for the international investment agreement (IIA) regime. Challenges arising from the negotiation of

[68] TD/B/C.II/EM.4/1 available at http://unctad.org/en/Pages/MeetingDetails.aspx?meetingid=643

IIAs and their implementation suggest that the time has come to revisit the IIA regime with a view to transforming it. Such challenges include the move towards megaregional agreements and the increasing number of investor–State dispute settlement (ISDS) cases.

5. Member States and IIA stakeholders at the 2014 IIA Conference, held in connection with the World Investment Forum in Geneva in October, called upon UNCTAD to develop a road map for the reform of the IIA regime and sketched the contours of such reform.

6. A number of developments characterize the current IIA regime and set the background against which such reform would be undertaken.

7. First, the balance is gradually shifting from bilateral treaty making to regional treaty making, including through megaregional agreements, such as the Regional Comprehensive Economic Partnership, the Trans-Pacific Partnership, or the Transatlantic Trade and Investment Partnership. These agreements, also known as "megaregionals", could have systemic implications for the IIA regime: they could either contribute to the consolidation of the existing treaty landscape or create further inconsistencies through overlap with existing IIAs, including those at the plurilateral level (*World Investment Report 2014*).

8. Second, the second-highest number of treaty-based ISDS cases were brought against host countries in 2014. Host countries — both developed and developing — have learned that ISDS claims can be used by foreign investors in unanticipated ways, as a number of recent cases have challenged measures adopted in the public interest (*World Investment Report 2014*). This has sparked growing interest in reform of the investment dispute settlement system.

9. Third, an increasing number of countries are concluding IIAs with novel provisions aimed at rebalancing the rights and obligations between States and investors, as well as ensuring coherence between IIAs and other public policy objectives, in response to the recognition that inclusive growth and sustainable development need to be placed at the core of international investment policymaking (2013 and 2014 editions of the *World Investment Report*).

UNCTAD Trade and Development Report 2014 – excerpts (pp. 46-48)

In an increasingly globalizing world, no less than at the domestic level, market activity also requires a framework of rules, restraints and norms. And, no different from the domestic level, the weakening and strengthening of that framework is a persistent feature. However, there are two important differences. The first is that the international institutions designed to support that framework depend principally on negotiations among States with regard to their operation. Essentially these States must decide on whether and how much of their own policy space they are willing to trade for the advantages of having international rules, disciplines and support. Inevitably, in a world of unequal States, the space required to pursue their own national economic and social development aspirations varies, as does the likely impact of an individual country's policy decisions on others. Managing this trade-off is particularly difficult at the multilateral level, where the differences among States are the most pronounced. Second, the extent to which different international economic forces can intrude on a country's policy space also varies. In particular, cross-border financial activities, as Kindleberger (1986) noted in his seminal discussion of international public goods, appear to be a particularly intrusive factor. But in today's world of diminished political and legal restraints on cross-border economic transactions, finance is not the only such source: as chapter V notes, there are also very large asymmetries in international

production, in particular with the lead firms in international production networks, which are also altering the space available to policymakers.

The growing interdependence among States and markets provides the main rationale for a well-structured system of global economic governance with multilateral rules and disciplines. In principle, such a system should ensure the provision of global public goods such as international economic and financial stability and a more open trading system. In addition, it should be represented by coherent multilateral institutional arrangements created by intergovernmental agreements to voluntarily reduce sovereignty on a reciprocal basis. The guiding principle of such arrangements should be their ability to generate fair and inclusive outcomes. This principle should inform the design, implementation and enforcement of multilateral rules, disciplines and support mechanisms. These would contribute significantly to minimizing adverse international spillovers and other negative externalities created by national economic policies that focus on maximizing national benefits. From this perspective, how these arrangements manage the interface between different national systems (from which they ultimately draw their legitimacy), rather than erasing national differences and establishing a singular and omnipotent economic and legal structure, best describes the objectives of multilateralism.

The extent to which national development strategies respond to national needs and priorities can be limited or circumscribed by multilateral regimes and international rules, but equally, they can be influenced by economic and political pressures emanating from the workings of global markets, depending on the degree of integration of the country concerned. While the extent and depth of engagement with the global economy may result from domestic economic policy choices, subsequent policies are likely to be affected by that engagement, sometimes in a way and to an extent not anticipated. As noted in TDR 2006, it is not only international treaties and rules, but also global market conditions and policy decisions in other countries that have an impact on policy space. Global imbalances of power (both economic and political) also remain undeniably significant in affecting the capacities of governments of different countries to engage in the design and implementation of autonomous policies.

There are valid concerns that the various legal obligations emerging from multilateral, regional and bilateral agreements have reduced national policy autonomy by restricting both the available range and the efficacy of particular policy instruments. At the same time, multilateral disciplines can operate to reduce the inherent bias of international economic relations in favour of countries that have greater economic or political power (Akyüz, 2007). Those disciplines can simultaneously restrict (particularly de jure) and ease (particularly de facto) policy space. In addition, the effectiveness of national policies tends to be weakened, in some instances very significantly, by the global spread of market forces (especially financial markets) as well as by the internalization of markets within the operations of large international firms.

It is important to consider whether, how and to what extent policy space is reduced and reconfigured. Limits on policy space resulting from obligations or pressures to deregulate markets tend to circumscribe the ability of governments to alter patterns of market functioning to meet their broader social and developmental objectives. Yet unfettered market processes are unlikely to deliver macroeconomic and financial stability, full employment, economic diversification towards higher value added activities, poverty reduction and other socially desirable outcomes.

But while national policies are obviously affected by the extent of policy space available, as determined by the external context, they are also – and still fundamentally – the result of domestic forces. These include, among others, politics and the political economy that determine the power and voice of different groups in society, domestic expertise and capacities, the nature of institutions and enforcement agencies, the structure

of the polity (e.g. degree of federalism), and prevailing macroeconomic conditions. Even when policymakers have full sovereign command over policy instruments, they may not be able to control specific policy targets effectively.

Furthermore, the interplay between these internal and external forces in determining both policymaking and implementation within countries in today's globalized world is an increasingly complex process. The emergence in the 1980s and 1990s, and the growing acceptance by policymakers throughout the world, of what could be called a standard template for national economic policies — irrespective of the size, context and nature of the economy concerned — was certainly influential (even if not always decisive) in determining patterns of market liberalization. But even as waves of trade liberalization and financial deregulation swept across the world, culminating in what we experience as globalization today, variations across individual countries suggest that they have retained some degree of policy autonomy, along with relatively independent thinking.

Certainly, for the more developed countries, globalization à la carte has been the practice to date, as it has been for the more successful developing countries over the past 20 years. By contrast, many developing countries have had to contend with a more rigid and structured approach to economic liberalization. This one size-fits-all approach to development policy has, for the most part, been conducted by or through the Bretton Woods institutions — the World Bank and the International Monetary Fund (IMF) — whose surveillance and influence over domestic policymakers following the debt crises of the 1980s were considerably extended giving them greater authority to demand changes to what they deemed to be "unsound" policies. Countries seeking financial assistance or debt rescheduling from the Bank or the IMF had to adopt approved macroeconomic stability programmes and agree to "structural" and political reforms, which extended the influence of markets — via liberalization, privatization and deregulation, among others — and substantially reduced the economic and developmental roles of the State. Similarly, and as discussed in greater detail in the next chapter, the Uruguay Round of trade negotiations extended the authority of the World Trade Organization (WTO) to embrace services, agriculture, intellectual property and trade-related investment measures, thereby restricting, to varying degrees, the policy space available to developing countries to manage their integration into the global economy.

Emphasizing the role of policy, and of the international economic institutions in promoting one set of policies over another, is an important correction to the view that globalization is an autonomous, irresistible and irreversible process driven by impersonal market and technological forces. Such forces are undoubtedly important, but essentially they are instigated by specific policy choices and shaped by existing institutions. It is also misleading to think of the global economy as some sort of "natural" system with a logic of its own. It is, and always has been, the evolving outcome of a complex interaction of economic and political relations. In this environment, multilateral rules and institutions can provide incentives and sanctions that encourage countries to cooperate rather than go their own way. And as the world has become increasingly interdependent, it is more challenging for countries to build institutional structures and safeguard remaining flexibilities in support of inclusive development. To the extent that markets and firms operate globally, there are grounds for having global rules and regulations. Moreover, international collective action is needed to help provide and manage global public goods that markets are unable or unwilling to provide. Dealing effectively with emerging threats, such as climate change, also requires appropriate global rules, regulations and resources. However, it goes without saying that governance at the international level is very different from governance at the national level, given that governments are being asked to surrender some measure of their sovereignty and responsibility to support collective actions and goals. It is imperative, therefore, and all the more so in a world of interdependent but unequal States and economies, for international measures to be designed in such a way that they complement

or strengthen capacities to achieve national objectives and meet the needs of their constituencies.

The system that has evolved under finance-led globalization has led to a multiplicity of rules and regulations on international trade and investment that tend to excessively constrain national policy options. At the same time it lacks an effective multilateral framework of rules and institutions for ensuring international financial stability and for overseeing extra-territorial fiscal matters. Within this imperfect system, policymakers in developed countries are aiming to tackle a series of interrelated macroeconomic and structural challenges, while those from developing countries are trying to consolidate recent gains and enter a new phase of inclusive development. It is therefore more important than ever before for national policy space to be made a central issue on the global development agenda.

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, General Assembly resolution 68/109 – excerpts

Article 1. Scope of application

Applicability of the Rules

1. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("Rules on Transparency") shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors ("treaty")* concluded on or after 1 April 2014 unless the Parties to the treaty** have agreed otherwise.

2. In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, these Rules shall apply only when:

(a) The parties to an arbitration (the "disputing parties") agree to their application in respect of that arbitration; or

(b) The Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application.

Application of the Rules

3. In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty:

(a) The disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty;

(b) The arbitral tribunal shall have the power, besides its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case, after consultation with the disputing parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules.

Discretion and authority of the arbitral tribunal

4. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:

(a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and

(b) The disputing parties' interest in a fair and efficient resolution of their dispute.

5. These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third persons.

6. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.

Applicable instrument in case of conflict

7. Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.

8. Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail.

9. These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings.

Draft Declaration on the Right to International Solidarity of the Independent Expert on human rights and international solidarity (A/HRC/26/34) – excerpts

Article 9

1. In the elaboration and implementation of international agreements and related standards, States shall ensure that the procedures and outcomes are fully consistent with their human rights obligations in matters pertaining to, inter alia, international trade, investment, finance, taxation, climate change, environmental protection, humanitarian relief and assistance, development cooperation and security.

2. States shall take appropriate, transparent and inclusive action to consult their populations and fully inform them of the decisions agreed upon at the national, bilateral, regional and international levels, in particular on matters that affect their lives.

Article 10

1. States shall establish an appropriate institutional framework and adopt domestic measures to give effect to the right of peoples and individuals to international solidarity, in particular by ensuring and facilitating access for everyone to domestic and international legislative, judicial or administrative mechanisms:

(a) When failure of States to fulfil their commitments made at the regional and international levels results in denials and violations of human rights; and

(b) When actions and omissions by non-State actors adversely affect the exercise and full enjoyment of their human rights.

2. States shall promote and prioritize support for micro, small and medium community based and cooperative enterprises which generate the majority of jobs around the world, including through national and international grants and concessional loans.

3. States shall be guided by International Labour Organization Recommendation No. 202 (2012) concerning National Floors of Social Protection, with a view to securing universal access to social services.

Article 11

1. States shall implement a human rights-based approach to international cooperation and all partnerships in responding to global challenges such as those relating to:

(a) Global governance, regulation and sustainability in the areas of climate change, protection of the environment, humanitarian relief and assistance, trade, finance, taxation, debt relief, technology transfer to developing countries, social protection, universal health coverage, reproductive and sexual health, food security, management of water and renewable energy resources, social standards, free education for all, human rights education, migration, and labour, and in countering dumping of toxic wastes, and transnational organized crime, such as terrorism, human trafficking, piracy and proliferation of arms.

2. States shall establish and implement appropriate mechanisms to ensure that international cooperation is based on equal partnerships and mutual commitments and obligations, where partner States are accountable to each other, as well as to their respective constituents at the national level, for the outcomes of policies, strategies and performance, whether at the bilateral, regional or international level, which shall reflect the best interests of their citizens and all others within their jurisdiction, in accordance with international human rights principles and standards.

3. States shall give effect to the establishment of a fair, inclusive and human rights based international trade and investment regime where all States shall act in conformity with their obligation to ensure that no international trade agreement or policy to which they are a party adversely impacts upon the protection, promotion and fulfilment of human rights inside or outside of their borders.

Article 12

The right to international solidarity shall impose on States particular negative obligations, required by applicable international human rights instruments, including:

(a) Not adopting free trade agreements or investment treaties that would undermine peoples' livelihoods or other rights;

(b) Not imposing conditionalities in international cooperation that would hinder or make difficult the exercise and enjoyment of human rights;

(c) Not denying anyone access to life-saving pharmaceuticals and to the benefits of medical and scientific progress.

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